

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY

CIVIL ACTION DIVISION

FLOYD J. KENYON, SR. and FLORENCE

KENYON, his wife,

Plaintiffs,

Case No. 00-5401

-vs-

Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a

foreign corporation,

Defendants.

AA/

TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE HERBERT BAUMANN
Circuit Judge

TAKEN AT: Courtroom Number 1
Hillsborough County Courthouse
Tampa, Florida

DATE: 29 November 2001

TIME: Commencing at 1:30 p.m.

REPORTED BY: Mary Elizabeth Blazer, RPR
Notary Public, State of Florida

STENOGRAPHICALLY RECORDED (ORIGINAL)

COMPUTER-AIDED TRANSCRIPTION (COPY)

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24 (appearances continued on next page)

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6 ALSO PRESENT:

7 FLOYD J. KENYON, SR. (Plaintiff)
8 FLORENCE KENYON (Plaintiff)
9 APRIL GEORGE (Paralegal to Mr. Acosta)
10 DAN DONAHUE (Corporate Rep. of R.J. Reynolds)
11 CHARLES WRIGHT (Technical Assistant -
12 R.J. Reynolds)
13 STEVE BERESHEIM (Technical Assistant -
14 R.J. Reynolds)
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|---|---|-----------|
| 1 | I N D E X T O P R O C E E D I N G S | |
| 2 | Witness or Proceedings | Page |
| 3 | APPEARANCES | 2457-2458 |
| | DAVID TOWNSEND, Ph.D. | |
| 4 | Redirect Examination by Ms. Parker. | .2488 |
| | CERTIFICATE OF REPORTER | .2581 |
| 5 | WORD INDEX. | end |

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1 (1:30 p.m.) P R O C E E D I N G S
2 THE BAILIFF: All rise. Civil court,
3 Division "D," is now back in session.
4 THE COURT: You may be seated.
5 Ready, Ms. Parker, Mr. Acosta?
6 MS. PARKER: Yes, Your Honor.
7 MR. ACOSTA: Yes, Your Honor.
8 THE COURT: Go ahead and get the
9 jurors.
10 (Whereupon, the jury returned at
11 1:35 p.m.)
12 MR. ACOSTA: May I approach the clerk,
13 Your Honor?
14 THE COURT: You may.
15 (Pause)
16 THE BAILIFF: All rise.
17 THE COURT: You may be seated.
18 All right. Good afternoon, ladies and
19 gentlemen. Mr. Acosta, you may proceed.
20 MR. ACOSTA: Thank you, Your Honor.
21 THE COURT: You may.
22 BY MR. ACOSTA:
23 Q. Good afternoon, Dr. Townsend. Good
24 afternoon.
25 A. Good afternoon.

1 Q. Doctor Townsend, you would agree that
2 the Premiere was patented as a drug delivery article,
3 true?

4 A. No, I don't agree with that. It was --
5 it was patented as a cigarette. There were a number
6 of other embodiments that was conceivable. And one
7 of those was to use it to deliver aerosols of various
8 types of materials. The original invention of
9 Premiere was as a cigarette.

10 Q. Well, let me show you what's been
11 previously admitted as Defense Exhibit, AN-00738.

12 This is from the American Medical
13 Association, April 25th, 1988. Citizen -- Petition
14 of the American Medical Association.

15 If I can refer to page 3, it states:
16 The -- let me get the pointer out here.

17 "The patent application expressly
18 states that the R.J.R. product may be used as a drug
19 delivery article."

20 Are you familiar with that,
21 Dr. Townsend?

22 A. I think in my answer to your previous
23 question, I indicated that in the patent, there are
24 several embodiments spoken to of the technology.
25 Premiere was a cigarette by the way it was put

1 together.

2 More general versions of that
3 technology, which include a heat source and a
4 capsule, and some substrate inside the capsule like
5 alumina, were considered as possibly ways to -- to
6 deliver an aerosol to -- to a person, say, for -- of
7 various drugs, for example, that might be effective
8 for asthma or the like. You know, it's -- so, we
9 recognized the general nature of the technology.

10 Your question was specifically about
11 Premiere. And the way Premiere was constructed was
12 very specific. And the way it was constructed
13 included tobacco and tobacco materials and was a
14 cigarette.

15 Q. My question is simple: Did the patent
16 application state that Premiere may be used as a drug
17 delivery article? Yes or no?

18 A. And I answered that in your very first
19 question. I said there are some embodiments spoken
20 to in the patent that include that.

21 Q. Thank you.

22 Now, I believe that yesterday or the
23 day before, correct me if I'm wrong, that you
24 testified that habituation was not a factor used by
25 R.J.R. in the design of the cigarette; is that

1 correct?

2 A. That's absolutely correct.

3 Q. Okay.

4 Then what I want to do is I want to ask
5 you a question about one of the documents we have in
6 evidence. This is Plaintiff's Exhibit 693.20. Let
7 me show it to you. And I think I may have a copy for
8 you.

9 MR. ACOSTA: May I approach, Your
10 Honor?

11 THE COURT: You may.

12 BY MR. ACOSTA:

13 Q. This is an R.J. Reynolds draft document
14 to Dr. Murray Senkus and Mr. Edward A. Vassallo dated
15 September 19, 1969 titled Proposal of a New
16 Consumer-Oriented Business Strategy for R.J.R.
17 Tobacco Company based upon an Analysis of the Effects
18 of the Smoking and Health Controversy and the Safer
19 Cigarette Strategy on Consumer Behavior.

20 And would you agree that this is a
21 document authored by Claude Teague?

22 A. This is a document authored by Claude
23 Teague.

24 Q. And, again, in 1969, Dr. Teague would
25 have been an assistant director of research and

1 development back at Reynolds research lab?

2 A. I'm not sure that's true. I really
3 don't know what his title was at that point.

4 Q. All right.

5 This is about 8 -- 15, 17, 18 years
6 after he started as a Ph.D. in 1953 by this point in
7 time?

8 A. That's about right. All I'm saying is
9 I don't know his title at this point.

10 Q. Okay.

11 Now, would you agree that Dr. Teague
12 predicted that the design of a safer cigarette
13 strategy really wouldn't be effective for a low tar
14 cigarette?

15 A. I think there's a number of general
16 assumptions that Dr. Teague made in this -- in
17 this -- in this report, or in this paper.

18 I think he was questioning the safer
19 cigarette strategy in a number of ways throughout
20 this document.

21 Q. And Dr. Teague concluded, did he not,
22 that the habituation factor was extremely strong and
23 should be considered in the design of the cigarette?
24 True?

25 A. Dr. Teague talks about a number of

1 things in this paper, including what he called a
2 habituation factor, a gratification factor, a cost
3 factor, a government regulatory factor. And he
4 devised, frankly, as part of his work at the
5 University of North Carolina at Chapel Hill as a
6 student, as an MBA student, he devised a rough model
7 of what he thought was important in the cigarette
8 business. This was, again, one of Dr. Teague's think
9 pieces.

10 Q. Is this something that you think
11 Dr. Teague did all by himself?

12 A. Yes, I do. In fact, I think this
13 clearly is a result of his experience at the
14 University of North Carolina at Chapel Hill as an MBA
15 student.

16 And, in fact, if you turn to page 20,
17 you'll see he acknowledges the faculty of the
18 executive program at the University of North Carolina
19 for stimulating his interest in this area. And in
20 particular, to his advisor there, Dr. Rehder, who
21 provided encouragement and special assistance in the
22 areas of behavioral science, strategic planning and
23 systems analysis.

24 This was, in my opinion after reading
25 this document a number of times, Dr. Teague's

1 personal contribution.

2 Q. Wasn't he also indebted to Dr. Murray
3 Senkus who was the director of research and
4 development at that time?

5 A. He says he was.

6 Q. And Dr. Frank Colby, who is another
7 Ph.D. scientist at Reynolds at that time?

8 A. He says that as well.

9 Q. And Dr. Marion, and Mr. -- excuse me,
10 Mr. Marion, Mr. Blevins, Dr. Haller, Dr. Neilson, and
11 Dr. A. H. Laurene all had given him ideas for use in
12 this paper?

13 A. All he says is the writer is indebted
14 to these people. Down at the bottom he says that --

15 Q. For ideas?

16 A. From the faculty and in particular his
17 advisor, for stimulating his interest in the area and
18 particularly his advisor who provided special
19 encouragement, special assistance in the areas of
20 behavioral science, strategic planning and systems
21 analysis.

22 Q. Dr. Townsend, the names I just read,
23 plus Dr. Woods and Dr. Cavallito for ideas,
24 suggestions, criticisms, data and encouragement in
25 developing and pursuing the thoughts presented above.

1 This wasn't solely Dr. Teague's idea, was it?
2 A. That's what you would infer from this.
3 Q. Thank you.
4 And the habituation factor, he created
5 a formula for this, didn't he?
6 A. Yes.
7 Q. Indicating what the propensity would be
8 for a person to smoke? And one of the stronger items
9 is the habituation factor, which he calls H; is that
10 true?
11 A. He includes in his equation a nicotine
12 habituation factor. I don't see anywhere in here
13 where it says it's one of the stronger items.
14 Q. All right.
15 Would you agree that he said the
16 habituation factor is believed to be relatively
17 constant and large for confirmed smokers?
18 A. He may have said that --
19 Q. Page 6?
20 A. -- and I just didn't recall him saying
21 it was one of the stronger factors.
22 Q. Page 6. He states -- let me make this
23 a little bigger.
24 "An individual's propensity to smoke is
25 seen to be determined by a variety of factors,

1 positive and negative. The positive factors which
2 have traditionally led to high values of "P" have
3 been physiological habituation (Nicotine) factor, H
4 and G, all other gratifications, physical, emotional,
5 social, et cetera, expected or derived from smoking
6 relatively high nicotine, high flavor cigarettes.

7 The habituation factor, "H", is
8 believed to be relatively constant and large for
9 confirmed smokers. The gratification factor "G", in
10 the past was strongly positive but now may vary
11 widely in value depending upon the needs of the
12 smoker, his habit pattern, his like or dislike for a
13 given flavor or level of flavor, health anxiety
14 associated with smoking, social attitudes towards
15 smoking and the like. The smoking health controversy
16 results in a net decrease in the value of
17 gratification factor "G", for many smokers, and in
18 the extreme case this factor may I assume zero or
19 even negative values."

20 Did I read that correctly, Doctor?

21 A. I believe you did.

22 Q. And in this paper Dr. Teague takes the
23 position that the safer cigarette strategy would have
24 serious long-term implications which were somewhat
25 disturbing for the company, true?

1 A. If you'll point me to a passage we can
2 look at.

3 Q. At page 9.
4 At the very top of page 9.
5 Whereby he states: "However, it will
6 be seen below this strategy has serious long-term
7 implications which are somewhat disturbing."

8 A. That's what he says mainly because he's
9 defined the safer cigarette strategy only as the move
10 to lower tar, lower nicotine cigarettes. It turns
11 out of course as we know he's wrong because consumers
12 have continued to move down to low tar, low nicotine
13 cigarettes which he was speculating consumers would
14 not. In fact, since Dr. Teague wrote this memo, of
15 course, light cigarettes has become the largest
16 category of cigarettes sold in the U.S.

17 Q. Didn't we discuss yesterday a press
18 release in which the FTC found that after 50 years of
19 design changes of cigarettes that it really wasn't
20 safe?

21 A. We talked about that and it's
22 absolutely incorrect that is a political conclusion
23 driven by a number of scientists who were asked by
24 NIH, and to actually work on that report.

25 Q. And isn't this something that

1 Dr. Teague predicted back in 1968, '69 when he wrote
2 this?

3 A. I think Dr. Teague in -- my take on
4 this report is that Dr. Teague was in fact referring
5 to the lack of consumer acceptance of low tar
6 cigarettes. What has happened over the years is the
7 consumers have -- have accepted low tar cigarettes.
8 Now, as we indicated in testimony earlier this week,
9 that trend seemed to level out, has opened the doors
10 for a number of other approaches to safer cigarettes.

11 Q. Dr. Teague felt that for Reynolds that
12 the increasing quest for a safer cigarette would
13 eventually end has something self-defeating?

14 A. Where are you reading from?

15 Q. Top of page 10, right there.

16 A. I think that's exactly consistent with
17 everything that I've said so far. If you read the
18 rest of the sentence it says: "This may well mean
19 that the increasing quest for safer cigarettes is in
20 the end self-defeating since it leads ultimately to
21 cigarettes wholly unsatisfying to the smoker and the
22 market vantages". So he talking about if you make
23 the tar and nicotine levels go down so far they
24 become unacceptable to smokers and people find them
25 unacceptable.

1 Q. In other words --

2 A. And don't buy them.

3 Q. -- if you make the cigarette safe, he's
4 saying it's self-defeating for the industry because
5 people aren't going to buy them, right?

6 A. I think I've already talked about safe
7 cigarettes. There are no safe cigarettes. There are
8 cigarettes that have reduced risk and probably are
9 safer. But there is no safe cigarette. So I don't
10 understand your question.

11 Q. Well, Dr. Teague -- do you agree -- let
12 me ask it this way: Do you agree that unless there
13 was some miraculous solution to the smoking and
14 health problem that the safer cigarette strategy
15 would be equivalent in the long-term to liquidation
16 of the cigarette industry?

17 A. I completely disagree with this.
18 Because Dr. -- Dr. Teague as I've already said
19 several times is assuming, number one, that the only
20 strategy for safer cigarettes is to reduce the tar
21 and nicotine level. In fact, there are many. He's
22 also assuming that if one reduces the tar and
23 nicotine levels from 1969, that those products would
24 be unacceptable. And people would quit buying them
25 and Reynolds would go out of business.

1 The fact of the matter is that the tar
2 and nicotine levels did come down dramatically, and
3 since 1969 people continue to trade down to the point
4 where lights is the largest category of cigarettes.
5 So Dr. Teague was wrong on a number of fronts.

6 Q. Although he was wrong, in your opinion,
7 Dr. Townsend, didn't he have another idea? He had an
8 alternative strategy, didn't he?

9 A. Is that a question?

10 Q. Yes.

11 A. Dr. Teague had lots of ideas. He
12 always had alternative strategies. And he was always
13 putting together think pieces like this. Ideas
14 proposing areas of research that were sometimes
15 really far out. The answer to your question is
16 absolutely.

17 Q. Okay.

18 And Dr. Teague's alternative strategy
19 was something that he thought was imperative for R.J.
20 Reynolds, true?

21 A. I think most all of Dr. Teague's ideas
22 he thought were imperative.

23 Q. And he also felt that his alternative
24 strategy -- this was something that he had thought of
25 back in 1968, and spent a year consulting with, one

1 time or another, Dr. Senkus, and Dr. Laurene and
2 Dr. Cavallito and all the other people we mentioned
3 at the end of this, and he felt -- well, let me ask
4 you this: At the time do you agree that the
5 technology was feasible to make the alternative
6 product that he thought Reynolds should make at the
7 time?

8 A. And that product would be exactly what?

9 Q. Well, let me ask you first, did he
10 think -- you say you've read this several times. I'm
11 going to show you the product in a minute. First I
12 want to -- I want to find out from you if you agree
13 with him when he says that he thought that the
14 product that he was proposing was technically
15 feasible?

16 A. I want to know which product you're
17 talking about because there are at least two in here.

18 Q. Well, I'll show you both of them, okay?
19 Do you agree about one but not the
20 other or do you agree that neither of them is --

21 A. I don't see --

22 Q. -- technically feasible?

23 A. If you ask me a question that's
24 specific to a particular idea, then I'll be glad to
25 answer you. But there's two in here and then you ask

1 me a general statement, do you agree, I can't answer
2 that question.

3 THE COURT: Go ahead and ask a
4 question.

5 BY MR. ACOSTA:

6 Q. I will. You would agree that at least
7 Dr. Teague thought that the products that he was
8 proposing were technically feasible at the time?

9 A. I don't know whether he believed that
10 they were technically feasible or not. All I know is
11 what I read in this document.

12 Q. And this document says, "That it was
13 felt that some tangible evidence showing that the
14 proposed new products are technically feasible would
15 generate interest in the proposed effort and help to
16 bring it into view for consideration.

17 First product, a transitional cigarette
18 like device. In concept it is a simulated cigarette
19 where tobacco -- where the tobacco rod burns but
20 little or no TPM of 4 or less smoke reaches the
21 smoker."

22 So he was proposing a cigarette where
23 the smoke didn't reach the smoker, true?

24 MS. PARKER: Your Honor, objection.

25 Rule of completeness, I would like to ask the

1 first line on the first page be read to the
2 jury.
3 MR. ACOSTA: The first page of the
4 document?
5 MS. PARKER: Yes, Your Honor.
6 THE COURT: Go ahead and read that,
7 then pose the question.
8 MS. PARKER: First page.
9 MR. ACOSTA: I'm trying to find the
10 first page. Oh, page one?
11 MS. PARKER: Very beginning.
12 MR. ACOSTA: I already read that line.
13 It's a draft.
14 THE COURT: Reread.
15 MR. ACOSTA: It's a draft.
16 THE COURT: All right. Ask the
17 question.
18 BY MR. ACOSTA:
19 Q. Do you agree it's a draft,
20 Dr. Townsend?
21 A. If says it is.
22 Q. Now, this is the chart that followed
23 that a transitional cigarette like device. Were
24 these the two products that Dr. Teague was proposing
25 at the time?

1 A. Well, I said at least two. These are
2 two what he called transitional products, there are
3 others that he suggests later on in the document.

4 Q. The first one had a smoke barrier with
5 tobacco in the front, correct?

6 A. Yes.

7 Q. And nicotine was somehow put behind the
8 smoke barrier, correct?

9 A. That would be my take of it.

10 Q. So when the smoker inhaled he would get
11 the nicotine, the flavor and the water and the air
12 but he wouldn't get the smoke, that was the -- the
13 design there, wasn't it?

14 A. In a general sense I think it's right.

15 Q. The second one, had a -- I can't quite
16 read that. Pressurized something generator.
17 Nicotine flavor, water, et cetera, do you know what
18 that second word is?

19 A. Aerosol, I believe.

20 Q. Aerosol. Pressurized aerosol
21 generator, which would provide nicotine flavor in
22 water. Control valve giving measured dosage
23 activated by lip pressure, drawing, et cetera.

24 Now, this report led to another report,
25 which we've marked and had identified and admitted

1 into evidence previously, Plaintiffs' 693.21.
2 MS. PARKER: Is that a question?
3 MR. ACOSTA: I'm identifying the
4 document on the record, Your Honor, and going
5 to present --
6 THE COURT: Well, if that's -- don't
7 make a statement, ask a question, you can
8 identify a document. Disregard the most
9 recent statement until there is a question
10 pending, ladies and gentlemen.
11 BY MR. ACOSTA:
12 Q. Dr. Teague, do you have before you
13 Plaintiff's Exhibit 693.21?
14 A. I'm not Dr. Teague.
15 Q. You know, I'm sorry, I -- Dr. Townsend.
16 A. I have 693/210.
17 Q. Yes.
18 Signed Claude E. Teague, Junior, dated
19 December 10th, 1969?
20 A. That's right.
21 Q. It says; document, have the word draft
22 at the top of it?
23 A. I don't see that.
24 Q. Entitled; New Product Strategy for
25 circumventing problems arising from the smoking and

1 health controversy?

2 A. Yes. But I don't see it addressed to
3 anybody in particular.

4 Q. You've seen this before?

5 A. Yes.

6 Q. Again, he reiterates the concept that
7 the industry should -- excuse me, he reiterates the
8 concept that R.J. Reynolds should consider product
9 strategy designed to expand the present market for
10 cigarette satisfaction?

11 A. Essentially that's what he says.

12 Q. And again, he reiterates that nicotine
13 is the physiological habituation factor which he
14 considers in his design?

15 A. I don't think that's new for Dr. Teague
16 at all. That's throughout his documents.

17 Q. And he indicates that whatever the work
18 is to be done on the product, will result in
19 technology useful in present products as well; true?
20 The bottom of the first page there?

21 A. That's what he's suggesting. I don't
22 know that that's true, but that's certainly what he
23 suggests.

24 Q. Well, he indicates that their new
25 strategy in simplistic terms should define the

1 satisfaction expected or derived from cigarette
2 smoking and to device and market profitable new
3 products away from conventional new cigarettes which
4 will provide those same satisfactions with no
5 significant hazard to the health of the user. That
6 was the goal; wasn't it?

7 A. He clearly articulates that as his
8 proposed strategy, which I think is at least the
9 portion about providing products, even on
10 conventional products with no significant hazards to
11 the health of the user. I think that's a lot of the
12 goal.

13 Q. And these were the products that he
14 came up with in the final -- well, we won't call it a
15 final -- we'll just call it this -- this document.
16 Examples of new products types contemplated. Again
17 we have a traditional tobacco burning. He states
18 that tobacco burns, but little or no smoke reaches
19 the smoker, instead air passing through a flavor
20 capsule delivered -- deliveries nicotine flavor,
21 moisture, et cetera, to the smoker. Inexpensive
22 tobacco could be used.

23 Does this have any features that --
24 basic design features in common with the Premiere or
25 the Eclipse?

1 A. Not really. Not really.

2 Both of these designs are really quite
3 different from Eclipse from a cigarette designer's
4 point of view.

5 Q. The second one doesn't burn any -- any
6 tobacco at all. That would be -- at least in that
7 respect similar to the Premiere?

8 A. It's -- I think you've misunderstood.
9 Premiere doesn't burn tobacco, but it has a lot of
10 tobacco in it because the heat actually transfers
11 flavors out of the cigarette. So you're transferring
12 tobacco flavors from tobacco.

13 This number 2, up here on the -- from
14 the report that you're talking about, I think Dr.
15 Teague, the way I understand this, this -- this
16 particular idea doesn't have tobacco in it at all.

17 Q. And these were products that Dr. Teague
18 thought Reynolds should start making back at that
19 time in 1969?

20 A. Again, my take on this document is that
21 he was suggesting these as possible directions for
22 unconventional, to use his words, new products. But
23 they weren't just these, he also talked about, for
24 example, esthetically clean chewing products and
25 others.

1 So I think he was again throwing out
2 ideas of general directions that one could take and
3 he put down, well, these are two possible examples
4 that one could consider.

5 Q. I think we've established that Reynolds
6 has never come out with Winston gum, have they?

7 A. No, of course not.

8 Q. And Reynolds started to design the
9 Premiere in 1982, some 13 years after this document,
10 correct?

11 A. I think the development actually began
12 somewhere between '81 and '82.

13 Q. And then the Premiere, which is the one
14 identified in this document as a -- a drug delivery
15 article, as I understand it, failed in the market, in
16 the late 1980s; true?

17 A. Premiere failed in the market in 1989.
18 However, you're absolutely incorrect that Premiere
19 was a drug delivery device. We've talked about that.
20 And Premiere is in fact a cigarette with a very
21 specific configuration. The reference that you made
22 that we talked about earlier is to additional
23 embodiments of heating technology that could deliver
24 certain type of drugs such as anti-asthmatics.

25 Q. Can also deliver crack cocaine, can't

1 it?
2 MS. PARKER: Your Honor --
3 THE COURT: Sustained.
4 MR. ACOSTA: Well, Your Honor, let me
5 ask it this way, Dr. Townsend --
6 MS. PARKER: Your Honor --
7 MR. ACOSTA: Isn't it true one of the
8 reasons that Premiere failed in the market --
9 MS. PARKER: Your Honor --
10 MR. ACOSTA: Can I finish?
11 THE COURT: Approach for a second.
12 Excuse us.
13 (Thereupon, the following discussion
14 was had at the bench out of the hearing of the
15 Jury:)
16 THE COURT: Asking about crack cocaine
17 is -- is --
18 MR. ACOSTA: It's, it's --
19 THE COURT: You can ask -- you can ask
20 about what types of substances, but saying
21 delivery of crack cocaine would be some people
22 might consider that to be prejudicial comment.
23 MR. ACOSTA: It may be, but he claims
24 the reason Premiere because it wasn't
25 acceptable to the consumer and the Surgeon

1 General said one of the reasons it is because
2 to deliver cocaine and that's --

3 THE COURT: But that -- that has
4 nothing to do -- I don't see how that has
5 anything to do with the failure of the --
6 failure of the product. It wasn't -- I mean
7 it -- just don't -- just don't interject.

8 (Thereupon, the bench conference was
9 concluded.)

10 BY MR. ACOSTA:

11 Q. Dr. Townsend. After Premiere failed,
12 then Reynolds decided to develop Eclipse; true?

13 A. Yes.

14 Q. And Eclipse was a cigarette that was
15 created and able to be smoked over a year ago, true?
16 You showed up with a package of Eclipse at the last
17 trial that we had, a year ago, right?

18 A. Yes.

19 Q. It has not been successfully marketed
20 yet, has it?

21 A. It is in the test market.

22 Q. It was in test market back then; wasn't
23 it?

24 A. It's been in several test markets.

25 Q. Now back in the early '70s, after Dr.

1 Teague had -- had proposed those alternative products
2 that we saw up there, he felt that the cigarette --
3 that R.J. Reynolds should stay with its conventional
4 products as long as it could; didn't he?

5 A. I've seen some language to that effect.

6 Q. And he said it again in 1982, that
7 Reynolds should stick with its conventional products
8 as long as it could; true?

9 A. I don't know, if you'll point me to a
10 document we can look at it.

11 Q. All right. 1773, it's the Nordine
12 document. It's the very last paragraph.

13 "Clearly, we will remain in the
14 conventional cigarette business as long as we can.
15 But I believe in view of the Nordine study and other
16 information we need to bring to -- to very -- we need
17 to begin to very seriously think about where we go,
18 if and when that market disappears. There are some
19 long-term, high risk cost things that need to be
20 addressed because, to repeat, we cannot be
21 comfortable marketing a product which most of our
22 customers would do without if they could".

23 So, you would agree that back in 1968,
24 1969, up to today, Reynolds has not marketed a safe
25 cigarette, have they?

1 A. A safe cigarette? There is no safe
2 cigarette. The answer is yes. Have we marketed
3 safer cigarettes? The answer is absolutely yes. In
4 my opinion there's adequate evidence that we have
5 marketed cigarettes that are reduced risk. Are they
6 safe? No. If somebody wants to completely eliminate
7 the risks of smoking they must stop smoking.

8 Q. But Reynolds waited until 1982 to even
9 begin to develop, '81, '82 to develop the Premiere,
10 true?

11 A. In 1981 or '82, in that timeframe there
12 were several things coming together that ultimately
13 lead to the development of Premiere. So in that
14 sense, that's right.

15 The -- however, there were a number of
16 other things looked at prior to that, and of course
17 as we've already talked about the general reduction
18 and selective reduction had been going on since the
19 '50s. But as you can see even see as evidenced by
20 Dr. Teague, there was a lot of thinking of other
21 approaches that one could take to reduce the risks of
22 smoking.

23 Q. One of the things that happened was
24 that there was no longer any support for a low tar,
25 low nicotine cigarette from the National Cancer

1 Institute back in the '70s, I think you testified
2 that for political reasons they did away with that?

3 A. Well, I think, once again you're
4 completely turning around my testimony.

5 In the case of the NCI-TWG, I will go
6 through this once again. The NCI-TWG was terminated
7 for purely political reasons in the late '70s. The
8 purely political reasons was because the government
9 was trying not to develop low tar, low nicotine
10 cigarettes. They were trying to evaluate the various
11 construction variables, like reconstituted tobacco,
12 expanded tobacco and they were trying to see if they
13 really made a difference in the biology, in the
14 chemistry. And this was essentially basic research
15 that the government was engaged in with the industry
16 and together with people from the public health
17 community and elsewhere.

18 In the late '70s, the government
19 decided what we really need to do is we really need
20 to convince people to stop smoking. And smoking
21 safer cigarettes is not what we want them to do, we
22 want them to quit completely. That's the only
23 acceptable end point. And as a result they shut down
24 the NCI, TWG program. But to suggest that the NCI,
25 TWG was only interested in lower tar, lower nicotine,

1 that wasn't correct at all.

2 Q. It was after that point that you
3 started developing Premiere?

4 A. Well, the NCI, TWG group was terminated
5 in the late '70s. We began Premiere in '81, '82.
6 There's no connection between those two, between
7 those two facts.

8 MR. ACOSTA: That's all I have for you,
9 Dr. Townsend.

10 THE COURT: Ms. Parker.

11 MS. PARKER: Your Honor.

12 THE COURT: Redirect?

13 MS. PARKER: May I have a few minutes
14 to move the easel over, to set up our
15 computer?

16 THE COURT: You may. I'll tell you
17 what, ladies and gentlemen, that will probably
18 take few minutes. Why don't we take a
19 15-minute break.

20 (Whereupon, the jury was excused at
21 2:18 p.m.)

22 THE COURT: You're still testifying.
23 We'll be in a 15-minute recess.

24 (Thereupon, a recess was had from 2:19
25 p.m. until 2:35 p.m.)

1 THE BAILIFF: All rise. Court is now
2 back in session.
3 THE COURT: You may be seated.
4 Are you ready, Ms. Parker?
5 MS. PARKER: (Nods head)
6 THE COURT: Mr. Acosta?
7 MR. ACOSTA: Yes, Your Honor.
8 THE COURT: Very good.
9 Bring the jury in.
10 THE BAILIFF: Yes, sir.
11 (Thereupon, the jury returned at
12 2:40 p.m.)
13 THE BAILIFF: All rise.
14 THE COURT: You may be seated.
15 Ms. Parker, you may proceed.
16 MS. PARKER: May it please the Court.
17 Good afternoon, ladies and gentlemen.
18 REDIRECT EXAMINATION
19 BY MS. PARKER:
20 Q. Afternoon, Dr. Townsend.
21 A. Good afternoon.
22 Q. You were asked questions by Mr. Acosta
23 Tuesday, Wednesday, and all of today until now. Of
24 all the questions that he asked you, did Mr. Acosta
25 ask you even a single question about Floyd Kenyon?

1 A. No.

2 Q. And of all the documents that
3 Mr. Acosta showed you, did he show you even a single
4 document that you had written in your 24 years that
5 you've been at the company?

6 A. No, he didn't.

7 Q. All right.

8 MS. PARKER: Your Honor, may I ask the
9 witness to step down and write on the easel
10 here for me?

11 THE COURT: You may.

12 BY MS. PARKER:

13 Q. Dr. Townsend, I'm going to show you or
14 hand over to you some of these exhibits that you were
15 given by Mr. Acosta. And I'm going to ask, if you
16 will, just to go through here and put the date. You
17 can just put the year over on this side?

18 A. On the left hand side?

19 Q. That will be fine, just over here.

20 And if you'll look through them as you
21 do it. Let me just ask you generally if these are
22 all -- can you tell us whether these are all
23 documents that Mr. Acosta showed you and then he
24 asked you questions about whether or not there's a
25 link between lung cancer and smoking as you go

1 through there, all right?

2 A. (Witness complies)

3 Q. Okay. Can you tell us are these
4 documents Mr. Acosta showed you, and I'm going to ask
5 you questions with whether there's a link between
6 lung cancer and smoking?

7 A. Yes.

8 Q. During this -- if you'll just tell the
9 jury generally what period of time we're talking
10 about here? '50s?

11 A. Well, throughout the '50s and then the
12 early '60s.

13 Q. During that period of time do you know
14 whether the medical and scientific community had any
15 statements or issued any statements about whether or
16 not the public should be warned about health risks of
17 smoking during that time period?

18 A. Yes, I do know.

19 Q. And how do you know that?

20 A. I know that from documents in the R.J.
21 library.

22 Q. All right. Have you checked Reynolds
23 library and files to see what's in there with respect
24 to what the medical and scientific community was
25 saying during this period of time about whether or

1 not warnings or needed?

2 A. Yes, I've looked at R.J.R. files to see
3 what was said about lung cancer.

4 MS. PARKER: Your Honor, if I could
5 pull up at this time AN-29, please.

6 THE COURT: AN-29 is an exhibit?

7 MS. PARKER: If could you pull up the
8 date, please, so they can see the date.

9 BY MS. PARKER:

10 Q. Dr. Townsend, if you will, if you'll
11 write the date, just the year is fine. Just write
12 that up there.

13 A. On the right hand side?

14 Q. That will be great. Maybe you can draw
15 the lines between the two.

16 Okay. If you pull up the highlighted
17 portion.

18 And is this information or a statement
19 that's in Reynolds' files?

20 A. Yes.

21 Q. Okay. If you could read to the jury,
22 please, the highlighted portion.

23 A. "AMA, means the American Medical
24 Association: No conclusive proof.

25 Dr. Walter B. Martin, president of the

1 American Medical Association said there was no
2 conclusive evidence that -- that smoking caused
3 cancer of the lung.

4 I don't think the evidence is great
5 enough in this cigarette versus lung cancer problem
6 to warrant the AMA's advising people not to smoke."

7 Q. Thank you. Do you know whether the
8 American Cancer Society issued any kind of statement
9 during this period of time?

10 A. Yes, I do.

11 Q. All right. If you could, pull up
12 number AIW-250, please.

13 First if you could pull up the date.

14 And Dr. Townsend, if you would, just
15 right that date -- I know it's hard to see, but can
16 you tell it's 1956?

17 If you could pull up that quote.

18 If you could read that for the jury.

19 A. "American Cancer Society has resolved
20 to support as its resources permit, research efforts
21 to identify whatever cancer inducing substances might
22 may be in tobacco and its products. And to find the
23 means of eliminating them. In the meantime, it is
24 committed to setting the facts as they stand today
25 and as they accumulate before the people, all the

1 people, in this country. It does not hold that
2 smoking" -- and I can't read that word. Smoking --
3 "it does not hold that smoking causes cancer of the
4 lung. It does not propose to tell the people not to
5 smoke."

6 Q. And during this time period here, 1953
7 to 1962, did the Surgeon General of the United States
8 issue any type of statement with respect to this
9 issue?

10 A. Yes, he did.

11 Q. And again, is that information or
12 statement in Reynolds library and files?

13 A. That is in the R & D library at
14 Reynolds.

15 MS. PARKER: Your Honor, if I could ask
16 if we could pull up AIW-3641, please, and this
17 has been pre-admitted?

18 THE COURT: You may.

19 BY MS. PARKER:

20 Q. If you could put the date over, please.
21 And then I'm going to ask you if you will to read
22 what's on the screen for the jury.

23 A. "Surgeon General Bernie: Our position
24 is that we have informed the public through the
25 excellent coverage of the press, radio, and TV. We

1 have informed the official health agencies in the
2 states who are responsible for this area, and we have
3 informed the American Medical Association,
4 recognizing that many people will go to their own
5 physicians for advice.

6 "In other words, even though I'm firmly
7 convinced that we were right in making this statement
8 at this time, and letting the public know that in our
9 opinion, we believe there is a relationship between
10 excessive and prolonged cigarette smoking, I do not
11 believe that we would be on firm ground in
12 recommending such a warning sign at this time until
13 we have more specific information."

14 MR. ACOSTA: Your Honor, I have
15 something additional that I'd like to have
16 read under the rule of completeness.

17 MS. PARKER: If could you hand it up to
18 witness or I'll read it.

19 THE COURT: Ms. Parker, why don't
20 you -- do you have it for Ms. Parker to read?

21 MS. PARKER: I'll just read this:
22 "Mr. Blatnick, doctor, the British we
23 understand are circulating posture through
24 local health authorities, samples of which are
25 included in the July 26 issue of U.S. News and

1 World Report accompanying your interview Dr.
2 Haller on the truth about smoking and cancer,
3 see appendix, Exhibit 9, page 558, would that
4 be a proper function of the government in view
5 of the concerns expressed here as to the
6 seriousness of smoking?"

7 "Dr. Bernie, I don't believe so,
8 Mr. Chairman."

9 BY MS. PARKER:

10 Q. All right. During this period of time
11 did the National Cancer Institute issue any type of
12 statement or opinion about this same issue?

13 A. Yes, it did.

14 Q. And is that information that is in
15 Reynolds library or the files?

16 A. It is in the R & D file.

17 MS. PARKER: If we could pull up
18 AIW-280, Your Honor?

19 THE COURT: You may.

20 MS. PARKER: If you could put the date,
21 please.

22 All right. If you could pull up the
23 quote.

24 BY MS. PARKER:

25 Q. Dr. Townsend, if you could read that

1 for the jury, please.

2 A. "London, July the 7th. The United
3 States government needs more evidence before deciding
4 whether to warn against cigarettes as the British
5 government has done, world cancer experts were told
6 today.

7 The John. R. Haller -- Dr. John R.
8 Haller, director of the National Cancer Institute,
9 Bethesda, Maryland, made the point in an address
10 prepared for delivery before the seventh
11 International Cancer congress here."

12 Q. All right. Thank you. You can pull
13 that one down.

14 In 1964 did the American Medical
15 Association issue any type of statement regarding
16 this issue of smoking and lung cancer?

17 A. Yes.

18 Q. And is that information in Reynolds
19 library or files?

20 A. Yes, it is.

21 MS. PARKER: Your Honor, if we could
22 pull up AS-321, please.

23 THE COURT: You may.

24 Q. Pull up the date.

25 Thank you.

1 If you could pull up the quote.

2 BY MS. PARKER:

3 Q. Dr. Townsend, if could you read that
4 for the jury, please?

5 A. "With respect to cigarettes, cautionary
6 labeling cannot be anticipated to serve the public
7 interest with any particular degree of success. The
8 health hazards of excessive smoking have been well
9 publicized for more than 10 years and are common
10 knowledge.

11 Labeling will not alert even the young
12 cigarette smoker to any risks of which he is not
13 already aware."

14 Q. All right, thank you. You can take
15 that down.

16 Dr. Townsend, how do the dates in these
17 Reynolds documents on this side of the chart compared
18 with the dates of documents we've just read to the
19 jury?

20 A. Well, they're pretty much the same.
21 They span through the '50s into the early '60s.

22 Q. Okay. Thank you. Your Honor, he can go
23 ahead and take the stand?

24 THE COURT: He may.

25 BY MS. PARKER:

1 Q. Dr. Townsend, you were asked questions
2 by Mr. Acosta, about the definitions of addiction.
3 And I want to ask you if you are familiar with the
4 definition of addiction in the 1964 Surgeon General's
5 report?

6 A. Yes, I'm familiar with it. I'm
7 certainly not an expert in the area of addiction, but
8 I am familiar with it.

9 MS. PARKER: Your Honor, may we display
10 that?

11 THE COURT: You may.

12 BY MS. PARKER:

13 Q. Dr. Townsend, I'm going to ask you if
14 you will read that, please.

15 A. "Distinction between drug addiction and
16 drug habituation.

17 Smokers and users of tobacco in other
18 forms usually develop some degree of dependence upon
19 the practice, some to the point where significant
20 emotional disturbances occur if they're deprived of
21 its use. The evidence indicates this dependence to
22 be psychogenic in origin. In medical and scientific
23 terminology the practice should be labeled
24 habituation to distinguish it clearly from addiction,
25 since the biological effects of tobacco, like coffee

1 and other caffeine containing beverages, the tell
2 morsel chewing and the like, are not comparable to
3 those produced by morphine, alcohol, barbiturates,
4 and many other potent addicting drugs."

5 Q. Thank you. Dr. Townsend, how long has
6 that definition been the definition of the United
7 States Government?

8 A. It was the definition up until the 1988
9 Surgeon General report when the Surgeon General
10 decided to change the definition.

11 Q. All right. Now, regardless of what
12 label you use, regardless of whether it's called
13 habit or addiction, or whatever, can people quit
14 smoking?

15 A. Absolutely. As I've already testified,
16 more people have quit smoking than currently smoke.
17 I think the Surgeon General estimates it somewhere in
18 the neighborhood of 50 million people are former
19 smokers. People who have quit completely. Where
20 there are probably in the neighborhood of 40 million
21 people who currently smoke. So is it possible? The
22 answer is absolutely yes. Can it be difficult for
23 some people? You bet.

24 Q. Did Mr. Kenyon quit smoking?

25 A. Yes, he did.

1 Q. And on behalf of Reynolds, let me ask
2 you, are you aware that the plaintiffs do not have a
3 claim for addiction in this case?
4 A. I am aware of that.
5 Q. All right. Now you mentioned I believe
6 you just said -- well, let me ask you again, how many
7 Americans have quit smoking?
8 MR. ACOSTA: I object to the last
9 question, Your Honor, move to strike.
10 MS. PARKER: I asked him if he was
11 aware?
12 THE COURT: I'll overrule, go ahead.
13 MS. PARKER: Thank you, Your Honor.
14 BY MS. PARKER:
15 Q. How many Americans have quit smoking?
16 A. The Surgeon General's estimated about
17 50 million have quit.
18 Q. Do you know how many of those
19 50 million quit smoking without any assistance of any
20 kind?
21 A. Yes. The Surgeon General also has
22 estimated between 90 and 95 percent of the people who
23 have quit, of that 50 million have quit without any
24 assistance from any source.
25 Q. And to your knowledge has Reynolds ever

1 denied that cigarette smoking is a habit?

2 A. No.

3 Q. Okay. And to your knowledge has
4 Reynolds ever denied that it may be difficult to quit
5 smoking for some people?

6 A. Of course not. That's really common
7 sense, I believe.

8 Q. Now, with respect to the documents that
9 Mr. Acosta showed to you from other tobacco
10 companies, from Philip Morris, from Brown &
11 Williamson, British American Tobacco Company, have
12 you ever seen any of those documents outside of
13 litigation?

14 A. No. No, I haven't. The only time I've
15 seen them is in courtrooms like this.

16 Q. Are any of those documents from Brown &
17 Williamson or Philip Morris or British American
18 Tobacco Company that Mr. Acosta showed you, are any
19 of those in Reynolds research and development library
20 or Reynolds files?

21 A. I don't believe they are. You know, I
22 haven't done an exhaustive search of all Philip
23 Morris, and BAT, and British American, but I can't
24 recall finding a single one in our files.

25 Q. Let me switch gears and ask you,

1 Mr. Acosta asked you -- I think this was back on
2 Tuesday, about scientists that you testified about
3 who was at Reynolds by the name of Don deBethizy?
4 A. Right.
5 Q. You know Dr. deBethizy?
6 A. I know Dr. deBethizy very well.
7 Q. Okay. And Mr. Acosta asked you this
8 question: And "Dr. deBethizy admitted that some
9 smokers cannot stop smoking."
10 Do you recall that question?
11 A. I recall it very vividly because I
12 don't believe that Don deBethizy would have said that
13 based on my knowledge what he believes and
14 understands about science.
15 MS. PARKER: Your Honor, may we display
16 Exhibit AS-811, which is the monograph that
17 Mr. Acosta has used when he was asking
18 questions of Dr. Townsend?
19 THE COURT: You may.
20 MS. PARKER: Will you pull that up,
21 please.
22 BY MS. PARKER:
23 Q. Dr. Townsend, could you read for the
24 jury what Dr. deBethizy really said at that NCI
25 conference?

1 A. Yes. "Attributed to Dr. deBethizy: I
2 would not be surprised at that because the Surgeon
3 General said in 1981 that if you reduced your tar
4 intake, you reduce risk. It has been communicated
5 pretty clearly that if you can not stop or are
6 unwilling to stop, then reducing your tar intake is a
7 good idea."

8 Q. Did Dr. deBethizy ever say that some
9 smokers cannot stop smoking?

10 A. I've never heard Dr. deBethizy say
11 that.

12 Q. All right. Now Mr. Acosta asked you
13 some questions about this nicotine research, do you
14 recall that?

15 A. Yes.

16 Q. I want to ask you, what is Targacept?

17 A. Targacept.

18 Q. Can you tell the jury what Targacept?

19 A. Targacept is actually a company that we
20 recently spun off from R.J. Reynolds and it's now --
21 it's now an investor owned company. Reynolds still
22 owns a significant share of this company.

23 Targacept is actually the -- the head
24 of Targacept is actually Dr. deBethizy. Because
25 Dr. deBethizy and a number of his researchers were

1 studying nicotine and how nicotine behaves in the
2 body, you know, about nicotine receptors, some of the
3 things we've already talked about here.

4 And one of the things that spun out of
5 that research is that nicotine type compounds,
6 compounds that are similar to nicotine and nicotine
7 itself, has some positive affects on Alzheimer's and
8 other psycho degenerative diseases. And so deBethizy
9 and his scientists began working on analogs,
10 compounds that are similar to nicotine and have
11 the -- and have the beneficial effects on Alzheimer's
12 and Parkinson's disease, but don't have some of the
13 peripheral vascular affects that nicotine itself
14 does.

15 So they started inventing new compounds
16 that are similar to nicotine for the treatment of
17 Parkinson's and Alzheimer's disease. When it got to
18 a certain point, a number of investors started
19 investing in this company when we spun it off. And
20 in fact, they've got investors from around the world,
21 large -- large investment.

22 Q. Who -- who -- tell us again who is the
23 head of Targacept?

24 A. Dr. deBethizy.

25 Q. And did he start that work while he was

1 at Reynolds or is that something that he started
2 after he got to Targacept?

3 A. No, he started that while he was at
4 Reynolds. In fact, that work carried on for a number
5 of years until it got to the point that it looked
6 like it really was going to work. At that point
7 Reynolds decided to spin it off into an investor
8 owned company. I think Reynolds still owns --
9 retains about 43-percent ownership of the company.
10 And private investors own the other 60 percent.

11 Q. All right. Thank you. I'm going to
12 ask you just a few questions now about a lot of
13 information that Mr. Acosta asked you about, so I'm
14 just going to go kind of one by one through this.

15 First of all, let me pull up page 160
16 of the 1989 Surgeon General's report. And this is a
17 chart that Mr. Acosta showed you, I think, I think it
18 was back on Tuesday.

19 If you could blow that up, please.

20 Do you remember seeing that chart?

21 A. Yes, I remember that.

22 Q. Okay. Does that reference there to
23 active smoking, does that apply to Mr. Kenyon?

24 A. No, Mr. Kenyon has quit smoking.

25 Q. All right. Thank you. You can take

1 that down.

2 Now, do you recall -- do you -- can you
3 tell us whether or not Mr. Acosta asked you questions
4 about filter cigarettes in the 1950s?

5 A. Yes, he asked me a number of questions.

6 Q. Okay. Did Mr. Kenyon smoke filtered
7 cigarettes in the 1950s?

8 A. No, he didn't.

9 MS. PARKER: And then let's pull up
10 AS-995, and this is a Reader's Digest article
11 that Mr. Acosta showed you.

12 And he read you this quote from
13 Dr. Alvin Barac of New York. "It says a
14 witness for a cigarette manufacturer, I don't
15 believe, cigarette smoking produces any damage
16 with respect to the lungs, et cetera."

17 Is this gentleman, Barac is he a
18 scientist at Reynolds?

19 A. No, he's not.

20 Q. Has he ever been a scientist at
21 Reynolds?

22 A. Never has been.

23 Q. All right, sir, thank you. Mr. Acosta
24 asked you -- he showed you some documents and asked
25 you some questions about TIRC. Then he said the name

1 of that organization had changed to CTR, do you
2 recall that?

3 A. Yes.

4 Q. Did Mr. Acosta show you any documents
5 from Reynolds on the subject of TIRC or CTR?

6 A. No, he didn't.

7 Q. Okay. Now Mr. Acosta asked you some
8 questions about FDA regulations. And he held up
9 this -- this book he has here on his table there.
10 Are those regulations valid and in effect?

11 A. No, they're not. Reviewed by the U. S.
12 Supreme Court in a review by the Supreme Court. The
13 Supreme Court threw those regulations out.

14 Q. All right.

15 MR. ACOSTA: Your Honor, I object, that
16 misstates what occurred and I object to the
17 question and the answer, move to strike.

18 THE COURT: All right.

19 MS. PARKER: Your Honor, I'll follow
20 up.

21 THE COURT: Just approach for a second.

22 (Thereupon, the following bench
23 conference was had:)

24 MR. ACOSTA: Your Honor, I never asked
25 about regulation, I asked about study.

1 THE COURT: I understand. Here's the
2 problem, is you did hold up the book, okay.
3 But I'm going to sustain the -- I think the
4 appropriate response is those regulations are
5 not in effect, period. Don't get into
6 anything else. Just ask a leading question.

7 MR. ACOSTA: He's already answered that
8 and I object to her asking it again.

9 THE COURT: All right. Then -- what --
10 Ms. Parker -- I was going to sustain and have
11 her reask it. You just want me to leave it
12 like it is? All right. I'll leave the
13 pending answer, if you want me to do that.

14 MR. ACOSTA: I guess I don't understand
15 my option.

16 THE COURT: I was going to sustain,
17 because I don't think the Supreme Court has
18 anything to do with it.

19 MR. ACOSTA: Then she's withdrawing her
20 question?

21 THE COURT: I think the only thing --
22 the appropriate thing to say is the
23 regulations not in effect, period. I was
24 going to let her ask a leading question -- the
25 regulation.

1 MR. ACOSTA: That's as far as you can
2 go.
3 MS. PARKER: Do you want to leave it
4 like it is?
5 THE COURT: Or do you want to leave it
6 like it is and move on?
7 MR. ACOSTA: If she just moves on,
8 that's fine.
9 THE COURT: All right.
10 (Thereupon, the bench conference was
11 concluded.)
12 THE COURT: All right. Ask the next
13 question.
14 BY MS. PARKER:
15 Q. All right. Dr. Townsend, do you
16 recall -- may I hold this up, this book?
17 MR. ACOSTA: Yes.
18 BY MS. PARKER:
19 Q. Do you remember -- do you recall
20 Mr. Acosta showed you this purple book and asked you
21 some questions from one of the chapters in there?
22 A. Yes.
23 Q. And in particular, did he ask you and
24 put on a screen an article by Jack Henningfield, do
25 you remember that?

1 A. Yes.

2 Q. Can you tell the jury who is Jack
3 Henningfield?

4 A. Jack Henningfield was formerly at the
5 National Institute of Drug Abuse. I think he's
6 currently at Henning & Associates in Washington.
7 He's a very outspoken tobacco control advocate. And
8 is in fact a witness for many plaintiffs in various
9 lawsuits.

10 Q. Do you know whether or not Jack
11 Henningfield had any relationship with -- he stepped
12 out now, Greg Maxwell who is the lawyer -- who was
13 sitting here in the middle earlier today?

14 A. I think Mr. Maxwell's firm has retained
15 Jack Henningfield.

16 MR. ACOSTA: Judge, I object on
17 relevance grounds.

18 THE COURT: Well, I'll sustain.

19 MS. PARKER: Goes to his credibility.

20 THE COURT: Go ahead. Well --

21 MR. ACOSTA: I object to that statement
22 and --

23 THE COURT: Hold on.

24 MR. ACOSTA: -- move to strike that.

25 THE COURT: Yeah, no extraneous

1 comments.
2 BY MS. PARKER:
3 Q. You were asked some questions by
4 Mr. Acosta about p53 mutations, do you remember that?
5 A. Yes.
6 Q. Do you know whether or not Mr. Kenyon's
7 pathology was ever tested to see whether or not
8 Mr. Kenyon had a p53 mutation?
9 MR. ACOSTA: Your Honor, I object, this
10 is beyond --
11 THE COURT: I'll allow that question.
12 THE WITNESS: Yes, I know. I said,
13 "Yes, I know."
14 BY MS. PARKER:
15 Q. Can you tell the jury?
16 A. Mr. Kenyon's -- Mr. Kenyon was not
17 examined for p53 mutations.
18 Q. All right. Now, you were asked some
19 questions also about cigarettes that were marketed by
20 Philip Morris. And you were asked some questions
21 about whether they had zero nicotine or virtually no
22 nicotine. Do you remember that line of questions?
23 A. Yes.
24 Q. All right. Can you tell us the names
25 of the Philip Morris cigarettes that you're talking

1 about?

2 A. Sure. This goes back to the early
3 1990s when Philip Morris marketed a de-nicotinized
4 cigarette essentially and they used, if you remember
5 the technology used for decaffeinating coffee. And
6 they marketed a number of cigarettes in the early
7 '90s called Merit, de-nic, Merit, de-nic and then
8 there were several styles of that full-flavored,
9 lights, ultra light. There was a product called Next
10 and there were a number of styles of that. And there
11 was some styles of Benson & Hedges had the
12 de-nicotinized tobacco in it.

13 Q. Just to be clear, did those cigarettes
14 have nicotine in them or not?

15 A. They did have nicotine.

16 Q. How do you know that?

17 A. From the Federal Trade Commission Tar
18 and Nicotine report.

19 MS. PARKER: Your Honor, I would like
20 to display that. It's AN-1499 please.

21 THE COURT: You may.

22 BY MS. PARKER:

23 Q. Pull it up. And if you could just tell
24 the jury what that is on the first cover there?

25 A. This is cover page of the annual

1 Federal Trade Commission report on tar and nicotine
2 and carbon monoxide yields from all cigarettes in the
3 United States.

4 Q. All right. And if you could pull up
5 just those references.

6 All right. Can you read for the jury
7 that line, and explain what that means.

8 A. B and H stands for Benson and Hedges.
9 Of course de-nic is de-nicotinized, meaning the
10 tobacco was processed to remove a fairly large
11 portion of the nicotine. It's a King size cigarette.
12 It has a filter. This particular one is a hard pack,
13 that's what HP is. This one is also a menthol
14 product. So it's a King size filter, hard pack
15 menthol lights. A lights product. Light category.

16 The next column over is the O9. That's
17 9 milligrams of tar per cigarette. And 0.1
18 milligrams nicotine per cigarette.

19 Q. All right. Let's pull up the next
20 screen please.

21 If you could tell the jury what that
22 means?

23 A. This is an example of Merit de-nic, one
24 pick style. It's also King size filter. This
25 happens to be in soft pack.

1 If you go further over, this is
2 8 milligrams tar per cigarette and also .1 milligrams
3 nicotine per cigarette.

4 Q. All right. And I believe there's one
5 more screen.

6 If you could read that line to the jury
7 and explain what that means.

8 A. This is the product called Next,
9 happens to be -- this is one style highlighted, it
10 happens to be King size filter, soft pack, menthol,
11 low tar. And the tar -- the tar yield is
12 7 milligrams per cigarette, the nicotine yield is .1
13 milligrams per cigarette.

14 Q. So how much nicotine were in these
15 Philip Morris cigarettes?

16 A. All of them -- all of them were
17 .1 milligrams per nicotine -- per cigarette.

18 Q. All right. Let me switch topics.
19 Mr. Acosta asked you some questions about what he
20 called compensation, when smokers switch from floor
21 flavor to low tar. Did Mr. Kenyon ever switch from
22 full flavor cigarettes to low tar cigarettes?

23 A. No, he didn't.

24 Q. Did Mr. Kenyon ever smoke a low tar,
25 low nicotine cigarette?

1 A. No, he didn't.

2 Q. Can you tell the jury why did Reynolds
3 do research and try to develop a lower tar, lower
4 nicotine cigarette?

5 A. A lower tar, lower nicotine?

6 Q. Uh-huh. (Indicating affirmatively)

7 A. The main goal of developing lower tar,
8 lower nicotine cigarettes is to -- is to provide
9 cigarettes that -- that may reduce the risks of
10 smoking. And it's because -- for two reasons we did
11 that, one is because going after safer cigarettes in
12 whatever variety or version, whether it's a Russell
13 type or low tar, low nicotine, or a Premiere or
14 Eclipse, going after low tar cigarettes and trying to
15 make consumer acceptable cigarettes, is the right
16 thing to do.

17 The second thing is consumers, there
18 are a number of consumers out there who really would
19 like the consumer acceptable reduced risk cigarette,
20 you know, if one's developed and given to them.

21 Q. Did the medical and scientific
22 community issue any type of statement or
23 recommendation with regard to developing a cigarette
24 with lower tar and lower nicotine?

25 A. I think for many years the public

1 health community, the government, various
2 governments, have called for lower tar and lower
3 nicotine as a way for smokers to reduce their risks.
4 Q. All right. Do you know whether the
5 United States Public Health Service, ever issued such
6 a recommendation you just described?
7 A. Yes, I do know that.
8 MS. PARKER: Your Honor, I would like
9 to pull up AS-273 at this point?
10 THE COURT: You may.
11 BY MS. PARKER:
12 Q. And Dr. Townsend if you could just
13 describe what this is for the jury and --
14 A. This is from the congressional record.
15 It's dated July 21, 1966 to August, 1966. Pages
16 16539 to 17998.
17 Q. If you could just tell the jury that
18 name?
19 A. Mr. Newsome.
20 Q. I think it's Magnason. It's hard to
21 see now that it's put back down. That it.
22 A. Magnason.
23 Q. All right. All right, I'll ask you if
24 you will read that to the jury.
25 A. "At the close of the meeting, the

1 following statements were adopted unanimously by the
2 group, and addressed to the Surgeon General: The
3 preponderance of scientific evidence strongly
4 suggests that the lower the tar and nicotine content
5 of cigarette smoke, the less harmful are the effects.

6 2. We recommend to the Surgeon General
7 that actions be encouraged which will result in the
8 progressive reduction of the tar and nicotine content
9 of cigarette smoke".

10 Q. All right, thank you.

11 Now Dr. Townsend do you know whether
12 back in 1970, the Federal Trade Commission said
13 anything about the issue of "having cigarettes with
14 lower tar and nicotine"?

15 A. Yes, the FTC did.

16 MS. PARKER: Your Honor, may I display
17 AN-550 at this time?

18 THE COURT: You may.

19 BY MS. PARKER:

20 Q. If you could identify that,
21 Dr. Townsend, please.

22 A. This is the Federal Trade Commission
23 report to Congress in 1970.

24 Q. And if you could pull up the quote.
25 Could you read that for the jury, please.

1 A. "Thus the regulatory problem presented
2 by these figures is that responsible medical opinion
3 indicates that the reduction of tar and nicotine
4 content in cigarette smoke decreases the hazard to
5 the health of that element of the population which
6 persists in smoking cigarettes. And the bulk of
7 those varieties which are at the low end of tar and
8 nicotine scale are filter varieties. To promote the
9 public interest, advertisers should not be
10 discouraged from promoting those varieties which rank
11 low in tar and nicotine".

12 Q. All right, thank you.

13 Now you've talked some about Dr. Wynder
14 and Dr. Hoffman. If you could just remind us briefly
15 who those two gentlemen are.

16 A. Well, actually Professor Wynder was the
17 scientist who developed -- or who conducted the first
18 successful mouse skin painting study with cigarette
19 smoke when he was at Washington University in
20 St. Louis. He later went on to Sloan Kettering and
21 worked with Dr. Hoffman, and actually both of these
22 scientists have pretty much devoted their life to the
23 study of cigarette smoke chemistry and cigarette
24 smoke biology.

25 They both then went on to the American

1 Health Foundation. Dr. Wynder actually formed the
2 American Health Foundation. Dr. Wynder recently died
3 and Dr. Hoffman is still there. But again they've
4 devoted their life's to the study of cigarette smoke
5 and the risks.

6 Q. Did Dr. Wynder and Dr. Hoffman write a
7 book that addressed the issue of lower tar, low
8 nicotine cigarettes?

9 A. They did. They wrote a very
10 comprehensive book. I think it was published in
11 1967.

12 MS. PARKER: Could you pull that up
13 please. Your Honor may we display AN-564?

14 THE COURT: You may.

15 MS. PARKER: Yes, if you could pull
16 that up please. In you could pull up the
17 quote.

18 Q. And Dr. Townsend if could you read that
19 for the jury please.

20 A. "The manufacturer should be encouraged
21 to produce cigarettes with increasingly lower tar and
22 nicotine yields".

23 Q. Thank you.

24 Now did the American Cancer Society
25 back in the -- well, 1976, make any type of statement

1 or recommendations with respect to lower tar, lower
2 nicotine cigarettes?

3 A. Yes, the American Cancer Society did.

4 MS. PARKER: Okay, Your Honor, may we
5 display AN-544.

6 THE COURT: You may.

7 BY MS. PARKER:

8 Q. And if you could just tell the jury the
9 date there?

10 A. This is September 27th, 1976.

11 Q. If you could display the quote please.

12 A. It says "lower tar, lower risk.

13 Does the smoker who switches to lower
14 tar, lower nicotine cigarettes reduce his risk of
15 lung cancer and heart disease? Excuse me. The
16 answer, according to a report from the American
17 Cancer Society last week is a qualified, yes. In the
18 first definitive study of its kind, ACS statisticians
19 found that the low tar and low nicotine cigarette
20 brands are really safer than the stronger ones, but
21 the safest course by far is not to smoke at all".

22 Q. Thank you.

23 Now, Dr. Townsend are you familiar with
24 Dr. Cuyler Hammond of the American Cancer Society?

25 A. Yes, I am.

1 Q. Can you tell the jury who he is?

2 A. He was Director of the American Cancer
3 Society. He's also probably one of the prominent
4 researchers in the area of cancer. Well, well-known
5 cancer researcher.

6 Q. Did Dr. Hammond make any type of
7 statement or recommendations back in 1980 about
8 reducing tar in cigarettes?

9 A. Yes.

10 MS. PARKER: And Your Honor, may we
11 display AS-115?

12 THE COURT: You may.

13 MS. PARKER: Thank you.

14 BY MS. PARKER:

15 Q. Pull that up.

16 Just tell the jury the date there.

17 A. 1980.

18 Q. All right. Could you just read that
19 quote please for the jury.

20 A. All right. The title is: The Long-term
21 Benefits of Reducing Tar and Nicotine in Cigarettes.

22 "Sometime in the early 1960s, the first
23 committee meeting ever on the subject of less harmful
24 effects of low tar, low nicotine cigarettes was
25 convened in Washington. At this meeting, Ernst

1 Wynder and I drafted a resolution that was approved
2 by the committee and was quoted in the congressional
3 record and by the Surgeon General. It said, 'The
4 preponderance of scientific evidence strongly
5 suggests that the lower the tar and nicotine content
6 in cigarettes, the less harmful would be the effects'
7 (U.S. Congress 1967).

8 This statement has been relevant ever
9 since -- ever since. Today I would change this
10 wording. Instead of saying that the preponderance of
11 scientific evidence strongly suggests, I'd now say
12 the preponderance of scientific evidence very
13 strongly suggests and I'd leave the rest of the
14 wording unchanged".

15 Q. All right. Thank you. Dr. Townsend,
16 did the Surgeon General back in 18 -- 1989, 1989, did
17 the Surgeon General issue any type of statement or
18 recommendation about lower tar, lower nicotine
19 cigarettes?

20 A. Yes, he did in the '89 report.

21 MS. PARKER: All right. Your Honor,
22 may we display AS-39 please?

23 THE COURT: You may.

24 MS. PARKER: If you would pull that up
25 please.

1 Q. If you could read that quote for the
2 jury please.

3 MR. ACOSTA: Could I have the page
4 please.

5 MS. PARKER: 44.

6 THE WITNESS: "More recent studies
7 continue to document lower risks in smokers of
8 filter cigarettes compared to the smokers of
9 non-filtered cigarettes".

10 Q. All right. Thank you. Now
11 Dr. Townsend, are these recommendations that we've
12 gone over on the screen, are these the only
13 statements made by the government or the public
14 health community about lowering tar and nicotine in
15 cigarettes?

16 A. No, they're by far not the only
17 statements. There are many, many, many statements,
18 you know, from the public health community, public
19 service announcements, official reports from
20 scientific organizations. There are many, many
21 recommendations that if one wants to reduce the risks
22 of smoking, moving to lower tar, lower nicotine
23 cigarettes, is a good step in that direction.

24 Q. And in your opinion as a cigarette
25 designer, based on your experience at Reynolds, has

1 Reynolds followed through on all these
2 recommendations made by the public health community
3 and the government?

4 A. We have followed through on the
5 recommendations and frankly we've been successful.
6 If you'll remember in the testimony back on Monday, I
7 guess it was, in my testimony, I'd indicated that we
8 had reduced the tar -- the tar levels from the high
9 '30s, an average of about 38, down to today an
10 average of about 12. And that's about a 66,
11 67 percent reduction overall in the tar level.

12 And that represents, I think, a
13 significant reduction in the risk to smokers in this
14 country.

15 Q. Is that one of the charts that you
16 showed the jury on Monday?

17 A. Yes, it is.

18 Q. If you -- I won't pull the chart out,
19 but if you could just describe to the jury which one
20 of the charts you're referring to.

21 A. It was the chart of sales weighted
22 averages. You remember there were two curves. It
23 started in 1954 and showed tar level at about
24 38 milligrams and then went down to -- to recent
25 times where it dropped to about 12 milligrams.

1 And then the second was -- the second
2 curve underneath it was the nicotine level, which
3 went from about 2.8 or thereabouts milligrams per
4 cigarette down to about .9 today. So two curves, it
5 was titled "sales weighted average, tar and
6 nicotine".

7 Q. All right. Now I'm going to pull up at
8 this point with Your Honor's permission Exhibit
9 693.21 that Mr. Acosta showed this afternoon.

10 THE COURT: You may.

11 BY MS. PARKER:

12 Q. Do you remember being asked questions
13 about this drawing here?

14 A. Yes, I do.

15 Q. All right. And that was from
16 Dr. Teague; is that right?

17 A. This is one of Teague's articles, yes.

18 Q. I want to ask you for both of these
19 drawings here, are these feasible safer alternative
20 designs that are superior to the designs that -- to
21 the cigarette designs for the cigarettes that
22 Reynolds actually manufactured and sold?

23 A. As a cigarette designer and a product
24 developer, I don't regard either of these as feasible
25 alternative designs. They're ideas that Dr. Teague

1 put on paper that have never been reduced to
2 practice, number one. Valuated for their performance
3 characteristics, demonstrated to be commercially
4 feasible. So they're ideas.

5 Q. Now, did Reynolds wait until the 1980s
6 when it started developing Premiere to try to develop
7 a safer cigarette?

8 A. No. We've had many projects well
9 before the '80s, because in parallel to -- in
10 parallel to our general reduction and selective
11 reduction and the general reduction we talked about
12 has been largely -- has been really successful. The
13 selective reduction has had some success, but has
14 been more difficult.

15 In addition to that we've had other
16 approaches to safer cigarettes, like the XG, GT and
17 other approaches at trying to make reduced tar,
18 medium nicotine cigarettes. And also we've had a lot
19 of work trying to develop more unconventional
20 cigarettes, too. There have been a lot of ideas,
21 some crazy, some a little more practical that pop up
22 from our scientists because we're -- we're always
23 looking for ways to reduce the risks. And that work
24 has gone well, well -- much earlier than 1980 and 81.

25 Q. I just have a couple more questions.

1 Mr. Acosta asked you some questions about what's the
2 proof, that's the word he used, what's the proof
3 about the relationship between smoking and lung
4 cancer? And some words were used, I want to ask you
5 to explain to the jury what those are.

6 The classical definition of cause was
7 one term that was used. Another term that was used
8 was the new relaxed definition. Can you tell the
9 jury what those terms mean.

10 MR. ACOSTA: Your Honor, I need to
11 object to the form of that question. I think
12 that misstates the question that I asked the
13 doctor.

14 THE COURT: I'll overrule. If you
15 understand you can answer.

16 THE WITNESS: Yes, I do.

17 There are really two -- two extreme
18 approaches to whether or not -- to deciding
19 whether or not cigarette smoking causes
20 cancer. The classical definition of causation
21 or the classical proof level of causation,
22 which has been in place up until fairly
23 recently, in the scientific community, I'm
24 talking about scientific proof, is you need to
25 have epidemiology that says; yeah, this is

1 statistically related to that. Lung --
2 cigarette smoking is related to lung cancer.
3 You need to have some reasonable chemical
4 evidence of why that may be or biological
5 evidence. So there needs to be some
6 additional evidence that supports the theory.
7 And very importantly, you need an
8 animal model where you can go in the
9 laboratory with animals, administer or expose
10 the animals to cigarette smoke, and see lung
11 cancer. That model is -- has never been
12 demonstrated reproducibly. There is no animal
13 model test where you can expose animals to
14 cigarette smoke and they reproducibly get lung
15 cancer. So classically that's been one
16 requirement.
17 Another requirement classically has
18 been understanding the mechanism. Well, if
19 you know this happens and everything else fits
20 so far, why does cigarette smoke cause lung
21 cancer? And getting into the mechanism of how
22 that can happen. So you see it's a fairly
23 high bar to demonstrate -- to demonstrate
24 causation. And it's very tough. And it's the
25 animal model that's been missing and the

1 mechanism that's been missing to date that
2 causes some scientists to say not that
3 cigarette smoking doesn't cause it, but that
4 there's not enough information to -- to decide
5 that cigarette smoking does in fact cause lung
6 cancer.

7 It may. It very -- it may be more
8 probable than not. But there's not enough
9 using that classical definition.

10 Using the more modern definition I
11 think many scientists have concluded that
12 cigarette smoking does cause lung cancer
13 because the epidemiology is very strong from.
14 The epidemiology the statistics, lung cancer
15 is -- I'm sorry, cigarette smoking is a very
16 strong risk for developing lung cancer. So
17 the statistics are strong.

18 In addition to that, people have done a
19 lot of laboratory experiments. You can see
20 DNA damage on exposure to lung cancer even
21 though you don't form tumors. You can see
22 irritation in the airways of certain types of
23 animals, even though you don't see tumors.
24 And all that evidence pulled together is
25 consistent with a conclusion that -- that

1 smoking causes cancer, but it doesn't fit the
2 classical definition. And that's where most
3 scientists are today in the public health
4 community and the government. And frankly
5 there are a number in my laboratory as well
6 who accept this more relaxed definition, or
7 the more modern definition, I prefer to call
8 it.

9 Q. Dr. Townsend, if you could tell us what
10 do these definitions mean in terms of Reynolds
11 cigarette design efforts?

12 A. Whether you accept one definition or
13 another, it makes no difference in terms of what we
14 do at Reynolds in cigarette design.

15 Q. Why is that?

16 A. Because we've chosen to -- to assume
17 that cigarette smoking in fact does cause -- does
18 cause cancer. And -- and with that assumption we
19 then set about trying to figure out, well, what's in
20 cigarette smoke that we could remove, that would
21 reduce the risks? How can we show that through
22 biological tests, whether it's skin painting or
23 laboratory test tube studies. But regardless of
24 which -- which criteria you use for deciding on
25 causation, the fact is our operating premise has been

1 to assume that it does. And to -- to do everything
2 we can to reduce the risk of smoking.

3 MS. PARKER: Thank you.

4 Your Honor, I have no further questions
5 of Dr. Townsend.

6 THE COURT: Ladies and gentleman, do
7 you have any questions? If so raise your
8 hand. We have one. Okay. Ask Sylvia to go
9 over. (Handing question to the Court)

10 Counsel, just come forward.

11 (Thereupon, the following discussion
12 was had at the bench out of the hearing of the
13 Jury:)

14 THE COURT: Any issue on that?

15 MS. PARKER: No.

16 THE COURT: Read that in.

17 MR. ACOSTA: What's -- okay.

18 MS. PARKER: Apparently just remind you
19 about this, that's next.

20 THE COURT: And then we're done for the
21 day.

22 MS. PARKER: We have no witness. Need
23 to check.

24 THE COURT: I was thinking we're done
25 for the day. Just do the videos and be done.

1 Okay.

2 (Thereupon, the bench conference was
3 concluded.)

4 THE COURT: Dr. Townsend, has there
5 been changes made to the Salem full flavored
6 filters since 1972? And if yes, when?

7 THE WITNESS: Since 1972?

8 THE COURT: Yes.

9 THE WITNESS: The answer is, yes, there
10 have been a number of small changes to Salem
11 since 1972. Because it's an agricultural
12 product there are some small changes in blend
13 to make sure that the product is reasonably
14 consistent, as consistent as possible. And
15 making sure that the tar level and the
16 nicotine level is within the specifications
17 that the numbers that we in fact report to the
18 government. So there have been a number of
19 very small changes.

20 Also since 1972, the use of air
21 dilution was initiated, I think in 1980. And
22 the tar level of Salem 85, full flavor, which
23 is Salem 85 King size, has declined over time,
24 a bit.

25 So there has been some reduction.

1 There has been the use of air dilution
2 starting in 1980. I think -- well, no
3 expanded tobacco started in 1970. But there
4 have been a number of other changes.

5 The paper -- the cigarette paper has
6 changed a number of times, changing the
7 permeability of the paper. Generally going to
8 a more porous paper.

9 So, with the exception of the using of
10 air dilution in the filters, that's been the
11 big change, a gradual decline in tar and
12 nicotine -- not nicotine yield.

13 THE COURT: Speak to them.

14 THE WITNESS: I'm sorry. A gradual
15 decline in tar and nicotine yield and a number
16 of very small changes to insure consistency.

17 THE COURT: I think you may have
18 covered these two, but specifically what about
19 filter ventilation and paper porosity.

20 THE WITNESS: Yes. Filter ventilation
21 of course was added to Salem in 1980, Salem
22 filter. And the paper porosity has been
23 changed a number of times. Generally going to
24 more porous papers.

25 THE COURT: And between 1972 and the

1 present, what about reduction of BaP?

2 THE WITNESS: The benzo[a]pyrene level,
3 BaP, in tar is relatively constant. What that
4 means is as you reduce tar you reduce
5 benzo[a]pyrene pretty much to the same degree.
6 So if the -- if the tar level from Salem 85
7 has been reduced by 10 percent, to a first
8 approximation you will see a 10 percent
9 reduction in benzo[a]pyrene. Because the
10 concentration of benzo[a]pyrene is pretty
11 constant in tar. If you're using general
12 reduction techniques.

13 So the bottom line is, to the extent
14 tar has reduced in the Salem 85,
15 benzo[a]pyrene is reduced as well.

16 THE COURT: All right, sir. You're
17 free to step down.

18 THE WITNESS: Thank you.

19 THE COURT: Thank you.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: All right. Ladies and
22 gentlemen, we've got about 30 minutes of
23 videotape deposition. So we can take a break
24 now or just go into that. Does everybody just
25 want to go into that videotape deposition?

1 That will conclude our day today. So anybody
2 need a break I guess is another way -- raise
3 your hand.

4 MS. PARKER: Your Honor, we would call,
5 two depositions but they're very short. As
6 our first witness by videotape, Kathleen
7 Vandy. And we'll go straight from that to our
8 second videotape deposition and that's
9 Ms. Jeanne Fife. And Your Honor may I move
10 that easel.

11 THE COURT: You may.

12 And Members of the Jury, the sworn
13 testimony of Ms. Vandy and Ms. Fife, which was
14 given before this trial commenced, will now be
15 played to you by videotape. You are to
16 consider and weigh this testimony as if the
17 witnesses testified here in person.

18 We're going to display that up here?

19 MR. BEACH: Yes, Your Honor.

20 THE COURT: All right. Very good. If
21 for some reason you can't see or hear just
22 raise your hand.

23 (Thereupon, the videotape was played.)

24 "THE WITNESS: I do.

25 Q. Mrs. Vandy, my name is John Yarber and

1 as justs mentioned, I represent R.J. Reynolds in a
2 case brought by Florence and Floyd Kenyon and if you
3 would, if you could state your name and business" --
4 MS. PARKER: We can't hear.
5 "Q -- address for the record, please.
6 A. My name is Kathleen P. Vandy. I work
7 at Penn Mutual Life Insurance Company at 600 Dresher
8 Road, Horsham, Pennsylvania.
9 Q. How long have you been employed at Penn
10 Mutual?
11 A. Three years."
12 THE COURT: Put the volume higher
13 please.
14 "Q Okay, and what is your current title?
15 A. I'm an attorney in the Law Department.
16 Q. Okay.
17 What are your current job
18 responsibilities?
19 A. Well, as corporate counsel, we handle
20 the day in and day-out functions, legal functions of
21 the company. I, in particular, deal with a lot of
22 Customer Service questions, Claims Department
23 questions. I also handle subpoenas when they come
24 in.
25 Q. Would you be the person at Penn Mutual

1 most knowledgeable about records and able to answer
2 questions today about the records in this case?

3 A. Yes.

4 Q. Okay, and is it correct that you are
5 testifying here today in your capacity as Penn
6 Mutual's person most knowledgeable about the records?

7 A. Yes.

8 Q. And you were served a subpoena to be at
9 this deposition, correct?

10 A. That is correct.

11 Q. And are the records that we have marked
12 as Exhibits 2 through 5 all of the records that you
13 have for Floyd Kenyon?

14 A. Yes, they are everything we have.

15 Q. Now, I would like to ask you some
16 questions about Exhibit 2, which is the current
17 policy.

18 A. All right.

19 Q. Would all of Mr. Kenyon's current
20 records be kept in that policy, in the file that's
21 marked as Exhibit 2?

22 A. Yes.

23 Q. Okay. Would that include
24 correspondence related to the -- to the policy?

25 A. Yes. The files starts out, as we call

1 it, an App. File. It's got the original application
2 and the underwriting that was done on it.
3 Thereafter, if any other correspondence or any other
4 service is provided on the contract, the papers are
5 sent to be attached to the file and there's fiche
6 documentation within the last of couple of years that
7 we started maintaining instead of sending the hard
8 copy, so I checked that when I sent in the subpoena
9 request to make sure that all information that we
10 have available is sent.

11 Q. And if Mr. Kenyon were to send
12 correspondence to Penn Mutual, would that be kept in
13 the active file, along with the application and other
14 information?

15 A. Yes. Yes.

16 Q. Ms. Vandy, if I could just get you to
17 look at the second page of what has been marked as
18 Exhibit 2, and if you could identify what that page
19 is for the record?

20 A. It's part of the initial application
21 that Mr. Kenyon would have completed when the policy
22 was first taken out.

23 Q. Okay, and what is the date on that
24 application?

25 A. Well, there's a -- you mean page 3?

1 Q. Yeah, on page 3.
2 A. There's a date on page 3. Signed on
3 January 10, 1987.
4 Q. Okay, and who signed the policy?
5 A. Floyd Kenyon.
6 Q. Can you just read for the record
7 question 15C asks for on page 2?
8 A. 'Have you smoked cigarettes at any time
9 during the past 12 months?'
10 Q. Now, referring to Exhibit 2, if you
11 would like to take a minute to flip through it, is
12 there anywhere in any of the records attached as
13 Exhibit 2 where Mr. Kenyon changed the information
14 about his smoking in response to Question 15C?
15 A. No.
16 Q. Anywhere in Exhibit 2, is there a
17 record indicating that Mr. Kenyon was smoking at any
18 time after 1987?
19 A. No."
20 MS. PARKER: Your Honor, may I move
21 over there before the next one?
22 THE COURT: You may.
23 And the next one is Ms. Fife, correct?
24 MS. PARKER: Jeanne Fife.
25 THE COURT: Very good.

1 MS. PARKER: Thank you.
2 "(Witness sworn)
3 THE WITNESS: I do.
4 Q. Good morning, Mrs. Fife. How are you
5 today?
6 A. Fine, thank you.
7 Q. Ma'am, my name is Geoff Beach and I
8 introduced myself before we began. I represent the
9 defendant in this case, R.J. Reynolds.
10 Ma'am, we haven't met before, have we,
11 other than my --
12 A. No.
13 Q. -- introducing myself this morning.
14 You're appearing here because you were
15 subpoenaed to appear; is that correct?
16 A. Yes.
17 Q. Mrs. Fife, you understand that you have
18 sworn an oath in this deposition to tell the truth to
19 the best of your ability, correct?
20 A. Correct.
21 Q. You are Floyd Kenyon sister, correct?
22 A. Correct.
23 Q. You and your brother were born and
24 raised together in New York on Long Island by your
25 parents, Frank and Helen Kenyon.

1 Is that also correct?
2 A. That's correct.
3 Q. It's fair to say, is it not, ma'am,
4 that you have always enjoyed a very close
5 relationship with your brother?
6 A. Well, what do you mean by 'close
7 relationship'?
8 Q. Well, ma'am, you would count the
9 relationship that you enjoyed with your brother among
10 the more special of the relationships that you have
11 enjoyed over the course of your life, correct?
12 A. Yes. We just haven't been close
13 physically, though.
14 Q. But you have nonetheless maintained a
15 relationship through the telephone and with visiting
16 him from time to time; is that correct?
17 A. Yes.
18 Q. Now, ma'am, you recall from the years
19 when you were growing up that your father smoked; is
20 that correct?
21 A. Yes.
22 Q. Your mother, however, was a non-smoker;
23 is that correct?
24 A. That's correct.
25 Q. And, in fact, isn't it also correct,

1 ma'am, that to your knowledge your another didn't
2 approve of smoking?
3 A. No she did not.
4 Q. In fact, your mother strongly
5 disapproved of smoking; isn't that correct?
6 A. That's correct.
7 Q. And, ma'am, with respect to your
8 brother smoking, do you have any recollection of him
9 smoking in front of your parents when you would be
10 present --
11 A. No.
12 Q. -- while he was still at home?
13 A. No.
14 Q. You don't have such a recollection; is
15 that correct?
16 A. That's right.
17 Q. Now, when you and your brother were
18 youngsters, would your parents permit to you travel
19 to New York City unaccompanied by your parents?
20 A. How young do you mean?
21 Q. Age 13, 14?
22 A. No, they would not permit that.
23 Q. Now, your mother warned you and your
24 brother about smoking. You recall that, don't you,
25 ma'am?

1 A. Yes.
2 Q. And she warned you that you could get
3 cancer if you smoked, correct?
4 A. No, she didn't say that.
5 Q. Do you have any recollection of your
6 mother talking with you about cancer and smoking at
7 all?
8 A. No.
9 Q. Ma'am, do you recall being interviewed
10 by representatives of Reynolds earlier this year?
11 A. Yes.
12 MR. ACOSTA: Objection to the form.
13 Q. And do you recall telling them that
14 your mother warned you and your brother about getting
15 cancer from smoking?
16 A. No, no. That's -- I don't think she
17 knew that people could get cancer from smoking. She
18 just said, 'Don't even start smoking.' She said,
19 'It's a filthy habit, and you get bad breath.'
20 Q. Ma'am, do you recall your mother
21 advising you and your brother not to ever start
22 smoking. Is that correct?
23 A. That's correct.
24 Q. And she advised you that it was a
25 filthy habit. Is that also correct?

1 A. That's correct.
2 Q. Ma'am, were you present when your
3 mother would also talk to your brother -- talk to
4 both you and your brother about smoking? Do you
5 recall that?
6 A. I don't remember because it was not a
7 formal discussion. It was just comments you would
8 make now and then. And I don't know whether she
9 spoke to us separately or together.
10 Yes.
11 Q. And to your knowledge your father went
12 to a doctor because he was having problems with his
13 throat. Is that correct?
14 A. Correct.
15 Q. And to your knowledge your doctor
16 was -- advised that he had polyps on his throat from
17 smoking?
18 Is that correct?
19 A. On his vocal cords.
20 Q. On his vocal cords.
21 In any event, you have a recollection
22 of your father returning from a doctor and expressing
23 that he had been advised that he had polyps on his
24 vocal cords from smoking; is that correct?
25 A. I don't know if he said from smoking,

1 because I wasn't living there then. I knew he had
2 surgery to have the polyps removed.

3 Q. Okay. The doctor -- your father's
4 doctor advised he had polyps on his vocal cords and
5 advised your father to quit smoking, to your
6 knowledge, correct?

7 A. Yes, that's correct.

8 Q. And your father, in fact, then quit
9 smoking, correct?

10 MR. ACOSTA: Object to the form.

11 Q. Now, to your knowledge your brother was
12 aware that his father had quit smoking, correct?

13 A. Yes, he would have known.

14 Q. Do you recall, Mrs. Fife, your brother
15 expressing any concern about his own smoking as a
16 result of his father having quit?

17 A. No.

18 Q. Do you recall your brother attempting
19 or advising you that he had attempted to quit as a
20 result of his father's having quit smoking?

21 A. No, he never told me that.

22 Q. Ma'am, do you recall any instance in
23 which your brother discouraged your father from
24 quitting smoking, to your knowledge, in other words,
25 in which you were present?

1 A. No.
2 Q. You don't recall that, ma'am?
3 A. No.
4 Q. Ma'am, do you recall your brother ever
5 trying to discourage anyone from quitting smoking?
6 A. No.
7 Q. Do you recall your brother ever
8 suggesting that smoking is a safe activity?
9 A. No.
10 Q. Do you recall your brother ever
11 suggesting that smoking was a healthy activity?
12 A. No.
13 Q. Now, Mrs. Fife, as I understand it you
14 quit smoking yourself in the early 1980s; is that
15 correct?
16 A. That's correct.
17 Q. And about a month after you had quit
18 smoking, you had a conversation with your brother in
19 which you mentioned that you had quit smoking; is
20 that correct?
21 A. That's correct.
22 Q. And during that conversation your
23 brother advised you that he himself had quit smoke
24 being; is that correct?
25 A. That's correct.

1 Q. In fact, your brother advised you that
2 he had quit smoking six weeks earlier. You remember
3 that?

4 A. Yes.

5 Q. Did your brother say anything else to
6 you about quitting smoking other than he had quit six
7 weeks prior?

8 A. No.

9 Q. Your brother didn't tell you anything
10 about how he quit; is that correct?

11 A. No, he didn't.

12 Q. -- the question.

13 You don't recall your brother
14 complaining during your conversation with him in
15 which he told you that he had quit six weeks prior.
16 You don't recall him complaining about any difficulty
17 experienced with quitting during that conversation;
18 is that correct?

19 A. That's correct.

20 Q. And, ma'am, to your knowledge your
21 opinion brother never smoked again after that
22 conversation.

23 A. To my knowledge, no.

24 Q. You've never seen him smoke?

25 A. No.

1 Q. And he never told you that he was
2 smoking?

3 A. No.
4 Say that again.

5 Q. I'm sorry. I was just trying to put a
6 timeframe on this. I believe you indicated a few
7 questions ago that that conversation occurred in the
8 early 1980s.

9 A. Yes, that's right. Well, wait. 1980.
10 well, I stopped smoking in -- in August sometime. I
11 don't know exactly when.

12 And then he felt very happy that he had
13 done it six weeks or so before I did. So we didn't
14 talk about how hard it was to quit or anything. He
15 just thought that was great that he beat me to it.

16 Q. Well, ma'am, you didn't discuss the
17 process of quitting with your brother at all during
18 that conversation other than that you had both quit.
19 Isn't that correct?

20 A. I don't remember if I told him how I
21 quit.

22 Q. But you don't recall him --

23 A. He didn't tell me how he did.

24 Q. Now, prior to this conversation in the
25 early 1980s when your brother advised you that he had

1 quit smoking, ma'am, do you recall him, again prior
2 to that conversation, expressing an interest in
3 quitting to you?

4 A. No.

5 Q. Prior to your conversation with your
6 brother in which he indicated that he had quit
7 smoking, do you recall him indicating that he had
8 been trying to quit smoking?

9 A. No. It's not something that we
10 discussed because we didn't see each other, you know.
11 And whether he had been trying or not, I don't know.

12 Q. So, ma'am, it's fair to say that prior
13 to this conversation that you had with your brother
14 about -- in which you discussed that both of you had
15 quit smoking, you don't recall your brother in any
16 prior conversation indicating that he was trying to
17 quit smoking, correct?

18 A. Correct.

19 Q. Now, ma'am, you've seen your brother
20 from time to time during the past ten years; is that
21 correct?

22 A. I haven't seen my brother since '93.

23 Q. When your father passed away?

24 A. Yes.

25 Q. And you had seen your brother from time

1 to time prior to 1993, correct?

2 A. Once a year.

3 Q. Okay. And thinking about the period
4 from the early 1980s through to --

5 A. '93.

6 Q. -- '93, yes, ma'am, do you recall or
7 have any memory whatsoever which led you to believe
8 that your brother might still be smoking during that
9 time period?

10 A. I didn't know what he was doing because
11 I wasn't there.

12 Q. Ma'am, do you have any recollection,
13 thinking back to those visits, those annual visits
14 with your brother, from the period of the early 1980s
15 when he advised you that he had quit smoking, through
16 to 1993, in that ten or so year time period, do you
17 have any memory whatsoever of him doing or saying
18 anything that led you to believe that he was still
19 smoking?

20 A. No, no.

21 Q. No, he did not?

22 A. He didn't -- no, he didn't say that he
23 was still smoking. And he didn't smoke. I mean, I
24 never saw him smoke.

25 Q. Mrs. Fife, now I want to ask you how --

1 how much older are you than your brother?
2 A. Three years and two months.
3 Q. All right. So you would have been born
4 about 197 -- 1925?
5 A. Yes.
6 Q. And did the two of you go to the same
7 high school?
8 A. We went to the same school, but not at
9 the same time because I was four years ahead of him
10 in school because I skipped some grades. So when he
11 went to high school, I was going to college.
12 Q. Okay. So you were not around him at
13 home when he was in high school?
14 A. He lived at home, and I lived at home
15 when I went to college. So, you know, we both lived
16 in the same home; but we had different circles of
17 friends.
18 Q. Okay. Now, I believe you were asked
19 some questions about your mother told you about
20 smokings. Do you remember that?
21 A. Yes.
22 Q. Do you have any recollection of your
23 mother ever talking to your brother about smoking?
24 A. No, I don't because as I said, it
25 wasn't a formal lecture. It was just a remark that

1 she would make and I remember when she would say it
2 to me; but we didn't just sit down and have a meeting
3 about it, you know.

4 Q. I believe you said that your mother
5 told you that the reason she didn't want you to smoke
6 was because it was filthy and it would cause you to
7 have bad breath?

8 A. Yes --

9 MR. BEACH: Objection.

10 A. -- that's right.

11 Q. And is that something that you remember
12 from the time that you were in high school?

13 A. Yes. She would say this before I ever
14 smoked, you know.

15 She said, 'Don't ever start smoking,
16 and here's why.' And I guess I was in high school.

17 Q. When you were -- did you smoke while
18 you were in high school?

19 A. I smoked when I was a senior. I smoked
20 one cigarette a day after lunch.

21 Q. Where did you get the cigarette?

22 A. Oh, well, we went to a luncheonette,
23 four of us girls, because we felt too grown up to eat
24 in the cafeteria anymore. And on the way to the
25 luncheonette, there was a cigar store that sold all

1 sorts of tobacco products.

2 And one of the girls told the rest of
3 us -- I didn't even know -- but that you could go in
4 the store and buy Lucy's, which was a pack of
5 cigarettes that the owner, or whoever, kept behind
6 the counter; and for a penny you could buy one
7 cigarette.

8 So we bought one cigarette and smoked
9 it after lunch and we didn't inhale, and we felt vary
10 grown up doing that. But we never smoked any other
11 time during the day or weekends. So that was the
12 extent of my smoking in high school.

13 Q. And during the 1950s, do you remember
14 ever having any conversations with your brother?

15 A. Yes.

16 Q. How often might you have seen him in
17 1950s?

18 A. Well, more often than we did later
19 because we weren't so geographically separated.

20 Q. Where did you live in the '50s?

21 A. In the '50s? In Ohio.

22 Q. And where did your brother live in the
23 1950s?

24 A. In New York.

25 Q. And how you get together then if he

1 lived in New York and you lived in Ohio?
2 A. I would go home to visit my parents for
3 a week every year, and then we moved to Pittsburgh.
4 Q. When was that?
5 A. Oh, middle of '50s I guess. We only
6 lived there for a year and then we moved to
7 Connecticut.
8 Q. And how long were you in Connecticut?
9 A. About seven years.
10 Q. And then where did you go from
11 Connecticut? Did you move to Texas?
12 A. No, we moved to California.
13 Q. California.
14 A. Uh-huh. (Indicating affirmatively)
15 Q. You remember what year you moved to
16 California?
17 A. In the early '60s. And we were there
18 less than two years.
19 Q. And then did you move to Texas?
20 A. Then we moved to Texas.
21 Q. And have you been in Texas ever since?
22 A. Yes.
23 Q. So from the mid 1960s until today
24 you've lived in Texas?
25 A. Yes, we moved to Texas in 1962.

1 Q. Do you recall specifically any
2 conversation that you had with your brother about
3 your father's vocal cord?

4 A. No, no.

5 Q. And you mentioned that you thought that
6 your brother would have been aware of it or would
7 have known about it. Were you simply speculating
8 that he would have known about it?

9 A. I don't know when he knew about it.

10 Q. What I'm trying to find out is how you
11 know that he knew about it. Do you have any idea as
12 to how you know that he knew about it?

13 A. No. I would just be speculating. I
14 don't know how he knew about it.

15 Q. Okay. And you never had any
16 conversation with him about it, have you?

17 A. No.

18 Q. Now, after you moved to -- I guess
19 California in the early '60s and then on to Texas,
20 how often did you see your brother Floyd?

21 A. About once a year when I went to New
22 York.

23 Q. Okay. And you just would see him when
24 you went home to visit your parents and whoever else
25 you knew in New York?

1 A. Yes.
2 Q. Other than that one telephone call that
3 you had in early 1980s regarding the time you quit
4 smoking --
5 A. Yes.
6 Q. -- did you ever have any other
7 conversation that you can remember with your brother
8 about the topic of smoking at any other time?
9 A. No.
10 Q. And I believe you said that you had not
11 seen your brother since 1993; is that correct?
12 A. That's correct.
13 Q. And during the -- let me ask you this:
14 Did you ever -- when you lived -- visited New York
15 during the '50s and '60s and '70s, and '80s, did you
16 ever stay at your brother's home?
17 A. I almost stayed at my parents' home. I
18 remember staying at his home in Florida one time.
19 Twice, actually.
20 Q. Twice.
21 What decade would that have been?
22 A. That would have been -- I really don't
23 remember. I guess -- I'm trying to think how I can
24 know when it was. I really don't remember.
25 Q. And then over the years, do you have

1 any recollection of any time your mother ever said
2 anything to your brother about smoking?

3 A. Not that I know of, no.

4 Q. And do you have any recollection of
5 anyone in your presence ever saying anything to your
6 brother about smoking?

7 A. No."

8 THE COURT: All right, ladies and
9 gentlemen, that concludes the testimony of
10 those two witnesses. And so, at this point we
11 will recess for today and see you at 9:00
12 tomorrow morning. Thank you.

13 (Whereupon, the jury was excused at
14 4:05 p.m.)

15 THE COURT: Okay, you may be seated.

16 With regard to some of the evidence
17 that's pending, the summaries I'm not going to
18 permit as exhibits. They may be used as
19 demonstrative aids. I do think that the
20 summaries, under 403, unduly emphasize a
21 portion of documents in evidence. It would be
22 akin to highlighting documents, which I've
23 already indicated we're not going to do. When
24 they're placed in evidence, however, the
25 documents -- certainly, you may publish from

1 the documents. With regard to the
2 newspaper -- with the newspaper-type articles
3 that were in four banker's boxes taken back to
4 my chambers, I've only reviewed a portion of
5 those, but those do appear, Mr. Acosta, to
6 admissible specifically under 4, 5, and 6 of
7 the risk utility test, those specific
8 elements. As for the obviousness of the
9 danger, common knowledge, and normal public
10 expectation of the danger and avoidability of
11 injury by care and use of the product,
12 including the effect of instructions or
13 warnings, it seems to me those three -- using
14 the term "broad" is probably an
15 understatement, but those three broad areas
16 encompass a variety of information available
17 to the general public.

18 In the negligence instruction, there's
19 reference to general knowledge. Although it's
20 not spelled out as such, it's -- you know,
21 there's a duty to warn only when the hazards
22 associated with the use of the product are not
23 obvious are not reasonably apparent. That can
24 encompass some general knowledge as well.

25 So, I haven't reviewed all of those

1 articles, but it appears to me from the
2 articles I have reviewed -- they appear to be
3 admissible. By the same token, your -- I was
4 comfortable during the case in chief to
5 deliver the elements. Now, defendant's case
6 has risen. In response to their evidence, you
7 can certainly, on cross-examination and/or
8 rebuttal, introduce documents which --
9 documents and/or other evidence which you feel
10 is needed to adequately put the items they
11 have placed before -- they're going to place
12 into evidence into context, whatever that may
13 be. I know between both sides there's
14 numerous -- innumerable documents that have
15 been accumulated.

16 But -- so, I have not looked at
17 every -- I have not looked through all four
18 boxes just simply because I have not had the
19 time, but what I've seen would be admissible;
20 and I -- so, I would encourage you to look
21 through the rest of those documents to see if
22 there's an issue, because it seems to me it
23 falls in those broad categories outline by the
24 risk utility test.

25 MR. BEACH: Your Honor --

1 THE COURT: And I looked at the --
2 there's four documents on the warning issue.
3 Those would appear, with the foundation, to be
4 admissible as well.

5 Go ahead, Mr. Acosta.

6 MR. ACOSTA: I was just going to ask,
7 when those documents get published, these
8 newspapers and so forth, I didn't object when
9 Dr. Townsend was going through them. It was
10 happening so fast, I couldn't -- I -- there's
11 no way any human being could have found the
12 document, looked at it, and made sure -- I did
13 find a Surgeon General issue that I would have
14 had -- wanted to have read in conjunction with
15 it under the rule of completeness. I couldn't
16 get it out before the next question came up.

17 So, I'm going to ask that counsel slow
18 down when they're doing these -- if they're
19 going to do these newspapers, at least long
20 enough to give me a chance --

21 THE COURT: I have no problem with that
22 request. To the extent the witness is going
23 to refer to a particular document, just make
24 sure that counsel has the document. I have no
25 problem with that, Mr. Acosta.

1 MR. ACOSTA: I would just like to see
2 it first.

3 THE COURT: And that works both ways.
4 Whenever either side is referring to a
5 document, opposing counsel certainly should
6 have an opportunity to be able to pull it up.

7 MS. PARKER: Your Honor, may I get over
8 there and get my notebook?

9 THE COURT: You may.

10 MS. PARKER: If I may, for the record,
11 since Dr. Townsend has now testified, if I
12 could just read in those warning numbers on
13 the exhibits to lay the foundation for it?
14 May I do that?

15 THE COURT: And just -- just hang on a
16 second. Were there any other documents,
17 Mr. Beach --

18 MR. BEACH: There were.

19 THE COURT: -- categories that I
20 haven't covered yet.

21 MR. BEACH: Yes, Your Honor. We've
22 discussed them and left it with some
23 follow-up. For example, there was the
24 published reference that you looked at
25 yesterday evening.

1 THE COURT: Yes.

2 MR. BEACH: Mr. Acosta and co-counsel
3 reviewed that, and I'm advised they had no
4 objection.

5 THE COURT: Other than the
6 previously -- other than, I assume, the
7 objection you previously stated --

8 MR. BEACH: Correct.

9 THE COURT: -- that I overruled.

10 MR. ACOSTA: Yes, that --

11 THE COURT: The only issue was
12 relevance, you know. Yeah, okay.

13 MR. BEACH: We've provided Your Honor
14 this morning obviously with that CD. I
15 suppose --

16 THE COURT: I haven't looked at that
17 yet.

18 MR. BEACH: And then finally, on the
19 polling data, Your Honor, we -- as previously
20 acknowledged, I've showed -- let me step back
21 a second. As previously acknowledged, I'm
22 going to admit the polling data on smoking and
23 health.

24 I had -- for a comparison purposes so
25 that when the historian testifies, to put the

1 numbers -- the percentages of the population,
2 knowledge and awareness in some context, we've
3 excerpted out polls on eight other subjects;
4 and as long as there's no objection to me
5 showing a demonstrative that illustrates those
6 other subjects, the -- the polling data that
7 he had in his file, to which plaintiff counsel
8 objects, is the data which underlies the
9 demonstrative. So, if there's -- in other
10 words, if there's no objection to the
11 demonstrative, I don't have a problem with not
12 admitting those into evidence.

13 MR. ACOSTA: I object to the contextual
14 aspect of it for this reason: I don't
15 believe -- well, what they're trying to do is
16 to compare common knowledge in, say, 1990 or
17 common knowledge in 1980 or common knowledge
18 in 1920 with what common knowledge was in 1950
19 by suggesting that, you know, in 1980 to 1992,
20 only 50 percent of the people knew who Al Gore
21 was. And then to say -- to compare that
22 with --

23 THE COURT: Except in Florida; right?

24 MR. ACOSTA: But I -- I don't think
25 that those are fair comparisons without at

1 least some kind of a foundation.

2 THE COURT: There needs to be some
3 year. I mean, if there's an objection that
4 the -- anything be received needs to have some
5 kind of a year or the date of publications
6 associated with it. I agree with that. I
7 mean, there needs to be some idea of the
8 relevant timeframe in anything, in any of
9 these items of evidence that are going to --
10 you know, they need to be identified, because
11 I think that's clearly -- there's going to be
12 a lot of argument by both counsel as to what
13 was known when. And so, as these exhibits are
14 received, you need -- we need to clearly
15 identify timeframes.

16 MR. BEACH: Your Honor, the clear --
17 that information is contained in the
18 demonstrative. All I was simply attempting to
19 do is offer that I don't need those -- those
20 specific contextualized polls admitted as long
21 as there's no objection to the demonstrative.

22 THE COURT: You're not seeking the
23 admission of those; you are seeking to seeking
24 to use them as demonstrative aids?

25 MR. BEACH: In case there's any

1 question about the demonstrative -- I mean,
2 the expert historian will testify, lay the
3 appropriate foundation, about why this is
4 relevant in comparison. It seems to me that
5 if Mr. Acosta has concerns about it, that's a
6 matter of cross-examination.
7 MR. ACOSTA: Absolutely. I agree.
8 THE COURT: All right. So, there's no
9 issue with that.
10 All right. So, that takes care of --
11 other than the videos, which I haven't looked
12 at --
13 MR. BEACH: That's correct.
14 THE COURT: -- those issues, other than
15 Mr. Acosta -- I haven't looked at every one --
16 I mean, there were four banker boxes of
17 newspapers -- newspapers, magazines, different
18 types of articles. So, you need to look at
19 those, too, and bring to my attention any
20 specific items; but I have not looked at all
21 of those yet, but I did look at enough to get
22 a gist of what was there in context of the
23 risk utility test.
24 MR. ACOSTA: Yes, sir.
25 MR. BEACH: Your Honor, if it's

1 acceptable with the Court, I would propose
2 that we will obviously provide the clerk with
3 a copy that I have with me today, Your Honor,
4 as well as index, which we can provide in
5 electronic format; and I would be happy to
6 provide the same list to Mr. Acosta so there's
7 no question as to precisely what -- what we're
8 providing to the clerk.

9 THE COURT: That's fine if that will
10 facilitate the process.

11 MR. ACOSTA: Thank you.

12 THE COURT: All right. Now,
13 Ms. Parker.

14 MR. BEACH: I'll do that after we
15 conclude today, Your Honor.

16 THE COURT: Ms. Parker.

17 MS. PARKER: Just very briefly, can I
18 read these numbers into the record and move
19 their admissions now that Dr. Townsend has --

20 THE COURT: Go ahead.

21 MS. PARKER: AN-29, AIW-250, AIW-3641.
22 That's -- I'm sorry, that last one has already
23 been pre-admitted. I apologize. AIW-280,
24 AS-321, AS-373, AN-550, AN-564, AN-544,
25 AS-115, AS -- I'm sorry. That's it. AS-115.

1 And then I just have one other.
2 THE COURT: Mr. Acosta.
3 MR. ACOSTA: I just need to find out if
4 what you're moving into evidence is the
5 complete document.
6 MS. PARKER: Well, I think some were
7 magazine articles. It was not the whole
8 magazine. It was just the --
9 MR. ACOSTA: Just the article?
10 THE COURT: The article. The complete
11 article.
12 MS. PARKER: Right.
13 MR. ACOSTA: As long as it's the
14 complete article, that's fine, Judge.
15 THE COURT: As long as the article
16 being submitted is the complete article,
17 although I think one of the references was one
18 of those books. I don't know if you're
19 submitting the entire book or not.
20 MS. PARKER: It's not one that we
21 were -- it's not on this list.
22 THE COURT: All right.
23 So, those will be admitted as long as
24 they're complete articles.
25 MS. PARKER: Your Honor, I hate to

1 sound like a broken record, and I know I'm
2 going to sound like it; but that biopsy report
3 that Mr. Acosta is going to give to us --

4 THE COURT: Well, that's the next
5 issue? What -- we've got -- I want to make it
6 through at least one witness tomorrow. Who,
7 if you know, is going to testify tomorrow, or
8 have you decided yet?

9 MS. PARKER: It's either going to be
10 Dr. Thomas or Dr. Rosenbach. I believe it's
11 going to be Dr. Thomas, but he's been here
12 since Monday thinking he was going to go on
13 the stand Tuesday based on what Mr. Acosta
14 said, and I have not had a chance to talk to
15 him today about his schedule.

16 THE COURT: So, he is your number
17 one --

18 MS. PARKER: He's the one I hope I'm
19 putting on tomorrow.

20 THE COURT: And he is an expert in what
21 field?

22 MS. PARKER: He is a toxicologist.

23 THE COURT: And he -- and the pathology
24 is or is not an issue?

25 MS. PARKER: Is not with him.

1 MR. ACOSTA: Your Honor, she keeps
2 saying on the record -- and she's done it
3 repeatedly -- that somehow I have done
4 something with Dr. Townsend. I just want the
5 record to reflect --

6 THE COURT: Townsend?

7 MR. ACOSTA: Dr. Townsend, that the
8 reason that her witness was late is so on and
9 so forth.

10 THE COURT: Well, listen -- I mean, the
11 record will speak for itself. I mean, it's --
12 but on several occasions, you indicated you
13 would be wrapping up within a couple of hours,
14 and you didn't. It's -- it's not a problem.
15 You're entitled to conduct -- I mean, as far
16 as I'm concerned, each side is entitled to
17 conduct as much or as little examination of
18 the witness as they think is appropriate for
19 their case.

20 You know, I -- it's your -- that is
21 your right. I'm not -- Ms. Parker is accurate
22 in noting that at different points you thought
23 you would wrap up earlier. You didn't. I
24 understand that. It's not something that I --
25 you're entitled to ask the questions. It

1 didn't go as quickly as you obviously were
2 anticipating or anyone else, but it's over.
3 We've finished this witness.

4 So, the biopsy report.

5 MR. ACOSTA: Yes, sir.

6 THE COURT: Here's the issue on the
7 biopsy report. Here's the issue that I'm
8 concerned with: It -- it is a piece of
9 evidence that was acquired after the close of
10 discovery and after the commencement of trial.
11 So, you're not going -- and I've indicated
12 before that before it gets used in some
13 fashion you need to have the authority of the
14 Court. Nonetheless, cross-examination -- you
15 know, what you're able to do during your
16 cross-examination is broader than what you can
17 offer during your case in chief.

18 So, the question is -- so, here's the
19 question I need to know: Are you going to use
20 the biopsy information in some fashion during
21 cross-examination?

22 MR. ACOSTA: Depending on what the
23 direct is, yes.

24 THE COURT: And that would be if there
25 was a contradiction of the results of that

1 biopsy report?

2 MR. ACOSTA: Well, it would be --

3 THE COURT: I assume some sort of
4 testimony that would -- that in your opinion
5 would contradict what the results were.

6 MR. ACOSTA: Yes, and there may be
7 other things as well. It depends on what the
8 witness says; and it's quite difficult to
9 anticipate what the witness is going to say,
10 but that biopsy report may be relevant for a
11 number of reasons.

12 THE COURT: Here's what you need to do,
13 because if we were in discovery, you would
14 obviously need to give the report to opposing
15 counsel. So, you need to get -- do they
16 have --

17 MR. ACOSTA: They got the report before
18 me and didn't give it to me.

19 THE COURT: That's all right.

20 Do you have the full report?

21 MR. ACOSTA: I have --

22 THE COURT: I say it's all right. It's
23 not all right; but, I mean, it's all right as
24 far as I'm concerned right now.

25 MR. ACOSTA: I have a report. As full

1 as it was at the time --
2 THE COURT: I need you to give the
3 reports that you have to them, a copy of them,
4 so we're just clear that they've got exactly
5 what you've got.
6 MR. ACOSTA: Okay.
7 THE COURT: Okay?
8 MR. ACOSTA: I'll do that.
9 THE COURT: And -- and then --
10 MS. PARKER: That's all I want.
11 THE COURT: Then, you know, because if
12 you were in discovery, you clearly would need
13 to produce it.
14 MR. ACOSTA: I'm not -- sure.
15 THE COURT: Make sure they have that
16 report, and pass that -- I don't know if
17 there's -- I don't know if there's any issues
18 I need to address with this.
19 MR. ACOSTA: I don't either. I don't
20 know that they're going to call Dr. Rosenbach
21 or not.
22 MS. PARKER: I don't think there's any
23 other issues at this time. I just want to
24 get -- Mr. Acosta said Monday or Tuesday,
25 whatever.

1 THE COURT: I recall the whole thing.
2 We don't have to go back through it. I just
3 need you to give them the report; because if
4 you were in discovery, you would have to do
5 it.

6 MR. ACOSTA: I will, Judge.

7 THE COURT: It's as easy as that.

8 MR. ACOSTA: There is another issue,
9 and it has to do with Dr. Thomas. We sent
10 expert interrogatories in the case.

11 THE COURT: Thomas is? Is he the
12 toxicologist?

13 MR. ACOSTA: He is the toxicologist.

14 We sent out expert interrogatories in
15 the case, and we did it timely just before the
16 close of discovery and asked them to tell us
17 what their expert opinions and so forth are
18 going to be.

19 Dr. Thomas -- the answer that they gave
20 indicates that he's going to speak generally
21 about toxicology and risks of smoking and
22 exposures to various things and all that.
23 They didn't provide any opinion that
24 Dr. Thomas was going to say anything related
25 to Mr. Kenyon directly.

1 And, for example, they have no doctor
2 listed -- in these expert interrogatories, no
3 doctor was disclosed in their answer that
4 would say that Mr. Kenyon has any ailment
5 associated with any of these risks. He
6 doesn't have asbestosis. He doesn't have any
7 exposure to radon. There's no evidence that
8 he's got any of those things; and there can be
9 none, because they answered interrogatories
10 and did not disclose those opinions from
11 anyone.

12 So, I don't want Dr. Thomas to come in
13 and testify that Mr. Kenyon lived in an area
14 where there was radon or he lived in an area
15 where he got asbestos exposure or he lived in
16 an area of high air pollution or anything like
17 that. For one thing, they didn't disclose
18 Dr. Thomas as providing an opinion like that.
19 Secondly, it would be improper, because there
20 is no -- there is and will be no testimony
21 that Dr. -- that Mr. Kenyon suffered as a
22 result of that. And I think it would be
23 prejudicial for them to try to put on some
24 evidence through this witness about any
25 specific exposure that Mr. Kenyon may or may

1 not have.

2 Now, I don't mind them putting it on in
3 general terms, because that may go to the
4 overall risk associated with lung cancer or
5 something like that, but not when it comes
6 specifically to Mr. Kenyon, because there are
7 no opinions like that, and there can be none.

8 THE COURT: When I address the
9 depositions of the school -- co-school
10 workers, I noted there has -- on those
11 asbestosis issues, there had to be a
12 foundation, because it's not obvious from
13 those depositions there was any friable
14 asbestos within that school building. The
15 fact that somebody works in a building with
16 building materials that incapsulate asbestos
17 is not enough to create that issue. So, there
18 has to be some kind -- I agree, Mr. Acosta,
19 there has to be some kind of foundation before
20 they can specifically go into issues.

21 Now, if there's a foundation and then
22 you're going to contend there is a surprise
23 because they haven't had disclosure, that's
24 another issue. But I don't know -- I'm
25 just -- one, there has to be some kind of

1 foundation. Two, after there's a foundation,
2 you know, there has to have been an
3 appropriate disclosure of what -- what the
4 testimony will be, you know, in response to
5 the question; and I don't know what the
6 questions were, but there has to be an
7 appropriate disclosure that would put
8 individuals on notice as to the proposed
9 testimony.
10 MR. ACOSTA: Is there a standard expert
11 interrogatory?
12 THE COURT: So, I agree there has to
13 be -- the foundation has to be laid, and then
14 there has -- there has to have been an
15 appropriate disclosure --
16 MR. ACOSTA: (Nods head.)
17 THE COURT: -- if the appropriate
18 question was made.
19 So, do you understand that, Ms. Parker?
20 MS. PARKER: I sure do.
21 THE COURT: Very good. So, we're
22 all --
23 MR. ACOSTA: Thank you.
24 THE COURT: -- we all have an
25 understanding there.

1 So, Thomas is likely?

2 MS. PARKER: Either Thomas or
3 Rosenbach. I believe it's Dr. Thomas.

4 THE COURT: And you said three hours
5 with Thomas direct -- your direct examination?

6 MS. PARKER: If we start at nine, I
7 hope I'm through by 12.

8 THE COURT: I'm just asking you, that's
9 your best estimate?

10 MS. PARKER: Either that or, if we
11 break from 12 to 1:30, I'll be through by 2 or
12 2:15, somewhere in that timeframe.

13 THE COURT: All right. So, we will --
14 I would like to -- you know, if possible, I
15 would like to conclude a witness. If I can't,
16 I can't.

17 MR. ACOSTA: I would, too, Judge.

18 THE COURT: But the next time the
19 witness is going to appear is Wednesday.
20 That's the main reason why I want to conclude
21 this, so we can finish up and go to Wednesday.

22 Do you have something, Mr. Denson?

23 MR. DENSON: Just because where we
24 ended yesterday with the impeachment issue
25 regarding the financial relationship of the

1 witness to the parties. I've got the Boucher
2 case from the Supreme Court, which, I think,
3 is the most recent case on that. I've given
4 defendants a copy and a copy for you.

5 THE COURT: Sure. Thank you.

6 All right. Anything further?

7 MR. ACOSTA: (Shakes head.)

8 MR. FUHRMAN: Yes, Your Honor. I

9 guess --

10 THE COURT: Okay.

11 MR. FUHRMAN: I'm sorry. Since
12 Mr. Denson passed up, I guess, the Boucher
13 case, this has to do with what they can ask
14 about how much an expert has been paid; and I
15 just -- I want -- we need the know if the
16 ruling --

17 THE COURT: I'd just tell you, this is
18 my understanding -- and I'll be happy to
19 re-read the cases. My understanding is you
20 can ask him how much they're charging, how
21 much they were paid on this file. You can ask
22 them what percentage of time they devote to
23 representation of this client and what
24 percentage of their -- you know, whether they,
25 you know -- whether they do any work for the

1 other side and if they only represent members
2 of a certain industry. You can ask that. But
3 you can't ask about any -- my understanding is
4 you cannot ask about annual salaries generated
5 from their work.

6 Am I incorrect about that?

7 MR. DENSON: I think you're incorrect.
8 The Boucher case states that they can discover
9 and can ask about and it's relevant as well
10 for the jury to know what the cumulative
11 amount that a party has been paid. If you
12 turn to page 6, at the top right corner,
13 Headnotes 3 and 4 at the top left corner
14 there --

15 (Pause.)

16 THE COURT: So, that's fine. I'll have
17 a -- I'll have an answer.

18 Here's the issue: The issue is Number
19 4 on the Footnote 6; right? Isn't that the
20 issue? "However, an expert shall not be
21 required to disclosure earnings as an
22 expert" --

23 MR. DENSON: Yes, sir. That's the
24 issue.

25 MR. FUHRMAN: Yes, sir.

1 THE COURT: -- "from other services,"
2 because it's clear that he can -- an expert's
3 involvement as an expert, which may be the
4 number of hours -- the percentage of hours --
5 percentage of income derived. So, I -- you
6 know, I could be totally wrong, but I recall
7 there was a recent case on this issue. So --
8 but I'm sure my trusted law clerk will have it
9 by tomorrow morning and I'll be able to
10 enlighten everybody by then.

11 MS. PARKER: Thank you, Your Honor.

12 MR. FUHRMAN: Thank you, Judge.

13 MR. ACOSTA: Thank you, Judge.

14 THE COURT: Court will be in recess
15 until 9.

16 (Whereupon, the proceedings were
17 concluded at 4:30 p.m.)

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COURT REPORTER'S CERTIFICATE

STATE OF FLORIDA)
CIRCUIT OF HILLSBOROUGH)

I, MARY ELIZABETH BLAZER, Court Reporter for
the 13th Judicial Circuit of the State of Florida, in
and for Hillsborough County,

DO HEREBY CERTIFY that I was authorized to
and did report in shorthand the proceedings and evidence
in the above-styled cause, as stated in the caption
hereto, and that the foregoing pages numbered 2456 to
2581, inclusive, constitute a true and correct
transcription of my shorthand report of said
proceedings and evidence.

Dated this 29th day of November, 2001.

Mary Elizabeth Blazer, RPR

